Supreme Court, U.S.
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No. 91-1397

IN THE
Supreme Court of the United States

October Term, 1991

CITY OF TUKWILA,

Petitioner,

v.

WORLD WIDE VIDEO, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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February 21, 1992

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QUESTIONS PRESENTED

1. With respect to the adult motion picture theater (peep show) portion of an adult business that also sells "take home" pornography, is Tukwila's adult entertainment zoning ordinance constitutional when it is designed to protect the substantial governmental interests of crime prevention, maintenance of property values, and preservation of the quality of urban life, and which also leaves more than 21 percent of the City available for adult uses to locate?

2. In enacting that same adult entertainment zoning ordinance, which regulates adult movie theaters including peep shows, nude dance clubs and other forms of "on-premises" pornographic exhibitions, as well as adult video stores, adult retail establishments, and

other forms of "take home" pornography, was the City Council justified in reasonably believing to be relevant to the "take home" establishments, all of the studies and other information that could be located about adult businesses, even though none of that available information was narrowly limited solely to the harmful secondary effects associated with "take home" pornography?

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I. REPORTS OF OPINIONS

The opinion of the Supreme Court of Washington is reported at 117 Wn.2d 382 (1991), reconsid. denied. The parallel citation is 816 P.2d 18 (1991).

II. STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of Washington filed its opinion on September 19, 1991. Appendix A. Both parties timely filed motions for reconsideration. The Supreme Court of Washington entered an order denying both motions on November 25, 1991. Appendix C.

This Court has jurisdiction to review by writ of certiorari the judgment of the Supreme Court of Washington pursuant to 28 U.S.C. § 1257(a) because that court ruled that Tukwila Ordinance 1465 violates the First Amendment to the United States Constitution.

III. CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment provides in full:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Tukwila Ordinance 1465 is attached as Appendix D.

IV. STATEMENT OF THE CASE

In November, 1987, World Wide Video opened an adult entertainment establishment in the City of Tukwila.[1] All of its merchandise is sexually

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[1] World Wide Video, Inc. and the City of Tukwila have been the only parties to this matter since filing of the Complaint. Supreme Court Rule 14.1(b).

explicit. FF 24.[2] It is improperly located in a commercial zone, directly abutting a single-family residential zone.

In 1988, the City adopted Ordinance 1465, amending its existing adult motion picture theater zoning ordinance to include a broad range of defined adult entertainment establishments. FF 39. The ordinance designated the M-2 zones, comprising more than 21 percent of the City, as available to adult uses. FF 19, 50. World Wide Video's business activities include the sale and rental of "take-home" sexually explicit video

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[2]Citations to "FF" refer to the trial court's numbered Findings of Fact, attached as Appendix B. All Findings of Fact were upheld on appeal, except Finding of Fact 45, which "has no impact on the outcome of the case." Appendix A 14-15; Appendix B 19-20.

tapes, magazines, and "novelty items", as well as the on-premises viewing of sexually explicit movies in peep show booths. World Wide Video's "take-home" business activities fall under the ordinance definitions of "adult bookstore", "adult retail store", and "adult video store". Appendix D 4-7. The peep show portion of World Wide Video's business activities falls under the ordinance definition of "adult motion picture theater". Appendix D 5.

Ordinance 1465 contains an express severability provision. Appendix D 14.

Ordinance 1465 permits adult entertainment uses outright in the M-2 zones. FF 18. The ordinance resulted from a long, detailed study undertaken by Senior Planner Jack Pace upon the request of the Planning Director. FF 7. Mr. Pace's study included information

gathered from a wide variety of sources, including leading cases from both the United States and Washington State Supreme Courts. Mr. Pace did not exclude any materials from his consideration, nor did he have any preconceived ideas of how the project should turn out. FF 7-12. While the City was reviewing materials necessary to prepare the ordinance, Mr. Pace (FF 7) was aware that the City might annex four new areas. He considered the potential of successful annexations in preparing his staff report and other materials in support of the zoning ordinance. FF 51. The annexed areas included two "adult cabarets", featuring nude and partially nude dancing. Appendix D 5. The annexations drastically changed the nature of the City. The population increased from 4,800 to more than 12,000, and the City

increased in size from approximately 2,800 acres to more than 5,100 acres. FF 48-49.

The annexations also greatly increased the amount of M-2 zone, in which adult entertainment establishments are expressly permitted to locate (FF 18), from approximately 100 acres to more than 1,100 acres (more than 21 percent of the City). FF 19, 50. Within the M-2 zone, space is available for lease. FF 53. Other retail outlets exist in the M-2 zone, including taverns, restaurants, bakery stores, and auto repair. FF 56.

Mr. Pace's report identified three adverse impacts associated with adult entertainment: increase in crime, decrease in property value, and incompatibility with other types of nearby land uses. The City Council

relied on that report and its attachments in enacting Ordinance 1465. FF 12-16.

The purpose of the ordinance is not to ban adult entertainment, but rather to provide for appropriate locations and standards for such uses. FF 28.

Later in 1988, the City Council adopted an Ordinance regulating panorams, or "peep shows". FF 39. That ordinance was necessary to combat illegal activity, generally illegal sexual activity, that occurs in the booths. World Wide Video knew that lewd conduct occurred in the booths. FF 5. This ordinance survived constitutional challenges in its entirety.

Ordinance 1465 was ruled unconstitutional by the trial court on the ground that it failed to provide adult entertainment uses with a reasonable opportunity to locate. The

Supreme Court of Washington ruled the ordinance unconstitutional on the ground that it failed to serve a substantial government interest, without reaching the issue of reasonable opportunity to locate.

A. Prior Consideration of Federal Questions.

This case involves review of a judgment of the Supreme Court of Washington. The only issue in this case, from inception, has been whether Ordinance 1465 comports with free speech guarantees.[3] The First Amendment challenge to Ordinance 1465 was raised

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[3]In the proceedings below, Ordinance 1465 was also challenged under the Washington State Constitution's free speech provision. The Supreme Court of Washington, however, ruled solely on federal constitutional grounds. Appendix A 15.

initially in World Wide Video's Complaint:

> "5. The plaintiff operates a video store and video arcade located at 14065 Interurban Avenue, Tukwila, Washington. The video stores sells and rents video tapes of a sexually explicit nature for viewing by adults in the privacy of the home. The arcade features individual coin operated viewing booths which display sexually explicit videos on premises. All of the foregoing activities are a form of speech protected by the First Amendment to the United States Constitution....
>
> ...
>
> 15. Ordinance 1465 deprives the plaintiff and members of the public of rights contained in the 1st and 14th amendments to the United States Constitution...."

At the conclusion of the trial,[4] the court orally ruled in part:

> "The problem with the ordinance that does not meet constitutional standards for the guarantee of

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[4] The "trial" was actually a consolidation of trial on the merits with a hearing on cross motions for preliminary injunctions.

> freedom of speech is that, as I said at the outset, in effect, the ordinance has eliminated that kind of business [adult entertainment] from the City.
>
> ...
>
> I realize that Justice Rhenquist says we don't have to guarantee an income, or guarantee that a business will earn money. It struck me today, in rethinking this, it's as if there was an ocean out there and that the water is the M-2 zone and you're asking a retail business to float in it."

Subsequently, the trial court's oral decision was reduced to comprehensive written Findings of Fact and Conclusions of Law. Appendix B. The trial court concluded in part that Ordinance 1465 violated the First Amendment. Appendix B 25-28.

Both parties appealed the trial court's decision. The Supreme Court of Washington accepted direct review on both the adult entertainment zoning and peep show licensing ordinance appeals. The

First Amendment question was extensively briefed by both parties. The City of Tukwila's assignments of error to the Supreme Court of Washington included:

> "....
>
> 8. Failing to find that adult entertainment uses could locate in the M-2 zones in Tukwila."

An issue presented on appeal by Tukwila was:

> "1. Whether the Trial court Erred in Determining that Adult Entertainment Establishments Are Not Afforded a Reasonable Opportunity to Locate in Tukwila and that the Zoning Ordinance is Therefore an Invalid Time, Place and Manner Regulation?"

After considering the briefing on the federal constitutional question, as well as additional briefing under a parallel provision of the Washington State Constitution, a majority of the Supreme Court of Washington concluded:

> "... When we believe a statute to be clearly in violation of the United

> States Constitution, as we do here with regard to Ordinance 1465, the zoning statute, it is unnecessary to enunciate a state rule and we do not do so...
>
> ... Because Tukwila has shown no substantial governmental interest that is served by regulating the numerous types of businesses covered by Ordinance 1465, the ordinance is unconstitutional under the United States Constitution."

Appendix A, at 15, 20-21.

V. ARGUMENT

This Petition should be granted because the decision of the Supreme Court of Washington squarely conflicts with the decision of this Court in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986). Supreme Court Rule 10.1(c).[5]

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[5]As an additional basis, counsel for Tukwila is informed by counsel for El Paso, Texas, that, if its motion for rehearing en banc is denied, El Paso will be filing a Petition for Writ of Certiorari to the Court of Appeals for

A. The Supreme Court of Washington Misapplied Prior Decisions of this Court in Failing to Conclude that the Tukwila Ordinance Serves a Substantial Governmental Interest.

The Supreme Court of Washington ruled that Ordinance 1465 was unconstitutional under the First Amendment because the "`substantial governmental interest' portion of the [Renton] test" was not satisfied. Appendix A 18. In the Washington Court's view, Tukwila had not shown that "take home" pornography establishments have the

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the Fifth Circuit in the case of Woodall, et al. v. City of El Paso, et al., 950 F.2d 255 (5th Cir. 1992). Like Tukwila, El Paso will be arguing a misapplication of Renton, as well as conflict among United States Courts of Appeal, pursuant to Supreme Court Rule 10.1(a). See, e.g., Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991); Thames Enterprises, Inc. v. St. Louis, 851 F.2d 199 (8th Cir. 1988).

same undesirable secondary effects known to exist at and around "adult movie theaters and peep shows". Id. Accordingly, the Washington Court concluded:

> "Because Tukwila has shown no substantial governmental interest that is served by regulating the numerous types of businesses covered by Ordinance 1465, the ordinance is unconstitutional under the United States Constitution. We need not, and therefore do not, reach the question whether the ordinance `unreasonably limit[s] alternative avenues of communication'."

Appendix A 20-21.

This holding is internally inconsistent, however, because World Wide Video has both "take home" pornography and on-premises peep shows. The Washington Court recognized that Ordinance 1465 does serve a substantial governmental interest in combating the known harmful effects associated with peep shows, but it failed to sever the

parts that it found offensive regarding "take home" pornography. The entire ordinance was invalidated. At a minimum, Ordinance 1465 should be found constitutional with respect to the defined "on-premises" adult entertainment establishments.

Like the many jurisdictions before Tukwila that had attempted to minimize by zoning the harmful effects known to exist at and around businesses that purvey sexually explicit material, Tukwila was concerned with crime, impacts on property values, and incompatibility between adult businesses and other types of nearby land uses. These impacts were specifically isolated by Tukwila Senior Planner Jack Pace in his detailed study of adult entertainment that preceded enactment of Ordinance 1465. Appendix B 5-10. The common denominator among these identified

impacts is quality of life for Tukwila's citizens and business owners.

Under this Court's decisions in Renton and Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), these are precisely the type of governmental interests required to sustain an adult entertainment zoning ordinance.

1. Regulation of the Place Where World Wide Video Exhibits or Distributes Adult Entertainment Media is Consistent With the First Amendment.

In Young, supra, this Court considered the constitutionality of a Detroit ordinance requiring inter alia that adult theaters acquire a license and not locate within 1,000 feet of any two other "regulated uses." The ordinance in Young, as in Tukwila (Appendix D 5), defined "adult theaters" as those which

exhibited material emphasizing defined "specified sexual activities" or "specified anatomical areas." Young recognized a city's legitimate interest in properly planning and regulating business uses within its boundaries, especially when those uses were burdened with the "less vital interest" in showing material on the "borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance...." 427 U.S. at 61, 49 L.Ed.2d at 320. World Wide Video deals exclusively in sexually explicit materials.

After disposing of an equal protection challenge, the Young Court's final inquiry was limited to whether the classification created by the ordinance was justified by the city's interest in preserving the character of its

neighborhoods. The Court relied on the district court's findings that adult movie theaters could cause neighborhood deterioration and an increase in crime not associated with other types of theaters, and that the ordinance was designed to cure those undesirable secondary effects, not to suppress adult entertainment. The Court reasoned that a city's interest in protecting the quality of life of its citizens is one which is due "high respect," and that a city should be given latitude to experiment with various alternatives to address that issue. 427 U.S. at 71, 49 L.Ed.2d at 327. The findings in Mr. Pace's staff report are consistent with the Young decision, concluding that adult entertainment uses caused neighborhood blighting and increases in crime, among other concerns.

2. The Renton Decision Further Supports the Tukwila Solution.

In 1986, this Court decided Renton v. Playtime Theaters, Inc., supra. The facts recited in the Renton decision are strikingly similar to the situation in Tukwila.[6] Compare 475 U.S. at 44-45, 89 L.Ed.2d at 35-36, and Appendix B 5-11.

The Renton decision was "largely dictated by our decision in Young v. American Mini Theatres," 475 U.S. at 46, 89 L.Ed.2d at 37, and established a three-part analysis:

1. Is the ordinance a time, place and manner regulation;

2. If so, is it content-neutral or content-based;

3. If content-neutral, does the ordinance serve a substantial government interest and provide

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[6]The City of Renton is adjacent to Tukwila. Tukwila observed Renton's case through the entire process.

> for a reasonable alternative means of communication?

Renton, 475 U.S. at 46-47, 89 L.Ed.2d at 37.

The Court first concluded that Renton, like Detroit in the Young case, had enacted a valid time, place, and manner regulation because adult theaters were not eliminated. Rather, their locations were simply regulated. The Court next determined that the Renton ordinance was content-neutral, even though adult theaters were treated differently than other theaters, because the predominant purpose of the ordinance was to regulate the secondary effects on the neighborhoods created by adult theaters, and not to regulate the content of films shown.

The same is true with Tukwila's ordinance. More than 21 percent of the

City is available to World Wide Video, but not its current location adjacent to a single family residential neighborhood. The sole purpose of Ordinance 1465 is to cure the harmful effects known to be associated with adult uses. World Wide Video need not close its doors -- it need only move a few blocks north or south.

The Renton Court next reviewed the portion of its decision in Young allowing Detroit properly to draw a distinction between locations of adult theaters and other theaters. With that in mind, the Court indicated that it was "clear" that the Renton ordinance served a substantial government interest with its concern for quality of life.

Tukwila's ordinance is patterned after Renton's. Significantly for Tukwila here, the Court squarely held (475 U.S. at 51, 89 L.Ed.2d at 40) that

Renton, in enacting its ordinance, was entitled to rely on the experiences of other cities and on the "detailed findings" regarding Seattle's adult entertainment experience summarized in the Supreme Court of Washington's decision in Northend Cinema Inc. v. Seattle, 90 Wn.2d 709, 585 P.2d 1153 (1978). Tukwila did likewise. Appendix B 6-8 (Finding of Fact 10(g)).

3. The Tukwila Ordinance Provides for Ample Alternative Means of Communication.

Finally, the Court in Renton considered whether the ordinance provided for reasonable alternative means of communication. The theater owner argued that insufficient available land was left for adult establishments and that no "commercially viable" locations were available even in that limited area. Approximately 5% of the city was left

available for adult theater sites.

> [T]he First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

475 U.S. at 54, 89 L.Ed.2d at 42. In determining that the city had satisfied this standard, the Court gave short shrift to the theater owner's argument that "practically none" of the area approved for adult theaters was available for sale or lease, ruling that economic impact is of no concern in First Amendment analysis. The First Amendment does not require a city to ensure that adult theaters are able to buy or lease space at bargain prices, or even to ensure that they are on equal footing with other prospective buyers and tenants. 475 U.S. at 53-54, 89 L.Ed.2d at 41-42.

Tukwila left more than 21% of the city available for adult entertainment uses, including land in all stages of development encompassing a wide range of uses. Appendix B 10, 23-25. More than reasonable opportunity exists for World Wide Video to operate in Tukwila.

B. Tukwila is Entitled Reasonably to Rely on Studies Conducted by Other Cities Because No Studies Existed Specifically Limited to the Harmful Effects of Adult Video Stores or Similar Exclusively Retail Adult Establishments.

The Supreme Court of Washington concluded that "Tukwila has not shown" that "take home" pornography has the same harmful secondary effects associated with on-premises pornography, resulting in a determination that the "substantial governmental interest" prong of the Renton test had not been met. Appendix A 18.

This Court set the standard differently:

> "The First Amendment does not require a City, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the City relies upon is reasonably believed to be relevant to the problem that the City addresses."

Renton, 475 U.S. at 51-52, 89 L.Ed.2d at 40. Scientific exactitude is not required with respect to isolating the harmful secondary effects of "take home" pornography -- only that the material relied upon by the City is "reasonably believed to be relevant" to the problem. Tukwila easily passes this test. Appendix B 6-8.

In Tukwila, the City looked at all available evidence. Nothing was excluded. The City had no preconceived notions about the results of its study prior to undertaking it. Appendix B 6-8.

Rather, the simple fact was that no studies existed then or now that are narrowly limited solely to the harmful secondary effects caused by adult businesses that deal in "take home" pornography. Common sense, however, dictates that the Tukwila City Council "reasonably believed to be relevant to the problem that the City address[ed]" studies and other material dealing with a wide range of adult entertainment issues.

Adopting the reasoning of the Supreme Court of Washington as consistent with the decision in Renton would lead to absurd results. Consider the example of an adult video store selling and renting precisely the same movies as are being shown at an adjacent adult movie theater. Under the Supreme Court of Washington's analysis, a reconstituted Ordinance 1465 is presumably valid with respect to the

movie theater, but invalid with respect to the video store, solely because no study exists to state the obvious: the harmful secondary effect of each business would be identical.

Ordinance 1465 was rejected because the Supreme Court of Washington found it to be overinclusive, regulating too many types of adult businesses. Ironically, the City of Renton faced a challenge that its ordinance was underinclusive, regulating too few types of adult businesses. Renton, 475 U.S. at 52, 89 L.Ed.2d at 41. The Renton Court dismissed this challenge, and recognized that a broader ordinance would be appropriate when other adult businesses were "contemplating moving into" a city. Id. At the time Ordinance 1465 was adopted, Tukwila already had the four types of adult business activities under

World Wide Video's roof (Appendix D 4-7), and knew that two adult cabarets, featuring nude and partially nude dancing, were in the annexation areas.

Tukwila requests that the decision of the Supreme Court of Washington be reversed as contrary to this Court's decisions in Renton and Young. Tukwila has demonstrated substantial governmental interests that are furthered by Ordinance 1465. Adult businesses have far more than a reasonable opportunity to locate in the available 21 percent of the City.

RESPECTFULLY SUBMITTED this 21st day of February, 1992.

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APPENDIX A

[No. 56619-4. En Banc.]

WORLD WIDE VIDEO, INC., Appellant, v. THE CITY OF TUKWILA, Respondent.

[1] Appeal -- Findings of Fact -- Review -- Substantial Evidence -- What Constitutes. Findings of fact supported by substantial evidence will be upheld on appeal. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.

[2] Constitutional Law -- Construction -- State and Federal Provisions -- Independent State Interpretation -- Applying Federal Provision -- Effect. By applying a federal constitutional provision that provides less protection than its state counterpart, a court does not adopt the federal standard as the state standard.

[3] Constitutional Law -- Freedom of Speech -- Nature of Speech -- "Pure" Speech. Written and filmed materials constitute "pure" speech for purposes of the First Amendment.

[4] Constitutional Law -- Freedom of Speech -- Time, Place, and Manner Restrictions -- Test. "Content-neutral" time, place, and manner regulations that affect free speech rights are valid under the First Amendment only if they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

[5] Zoning -- Obscenity -- Pornography -- Adult Entertainment Zoning Ordinance -- External Evidence. When enacting an adult entertainment zoning ordinance, a local legislative body may rely on

evidence generated in another jurisdiction only if that evidence is reasonably believed to be relevant to the problem that the ordinance is intended to address.

[6] Constitutional Law -- Construction -- State and Federal Provisions -- Independent State Interpretation -- Argument -- Necessity. A court will decide an issue under federal constitutional law when no argument is made pursuant to State v. Gunwall, 106 Wn.2d 54, that a different state constitutional standard should apply.

[7] Licenses -- Constitutionally Protected Activity -- Amount -- Test. License fees for the commercial exhibition of protected free speech activities must be reasonably related to the costs actually incurred by the government

in administering the licensing program.

[8] Statutes -- Construction -- Constitutional Construction. Whenever possible, a court will construe a statute so that it does not violate the constitution.

[9] Municipal Corporations -- Ordinances -- Construction -- Applicable Rules. The same rules of statutory construction apply to local ordinances as apply to state statutes.

[10] Licenses -- Constitutionally Protected Activity -- Ownership Disclosure. A local ordinance requiring the licensing of a commercial exhibition of protected free speech activities may require the disclosure of the identity of all persons holding a significant

interest in the business, with significance based on a responsibility for the management of the business.

[11] Licenses -- Constitutionally Protected Activity -- Application -- Timeliness of Decision. A local ordinance requiring the licensing of a commercial exhibition of protected free speech activities must provide an effective and reasonable period within which a decision on a license application must be made.

[12] Licenses -- Constitutionally Protected Activity -- Application -- Denial -- Availability of Judicial Review. A licensing ordinance affecting the commercial exhibition of protected free speech activities must allow prompt judicial review of a denial of a license.

DORE, C.J., and DURHAM, J., dissent in part by separate opinion.

Nature of Action: A business which sold sexually explicit materials and operated peep show booths challenged the validity of an adult entertainment zoning ordinance and a peep show licensing ordinance.

Superior Court: The Superior Court for King County, No. 88-2-15526-7, Mary Wicks Brucker, J., on October 26, 1989, entered a judgment invalidating the adult entertainment zoning ordinance and upholding the peep show licensing ordinance.

Supreme Court: Holding that the city had not demonstrated that the adult entertainment zoning ordinance furthered a substantial governmental interest but that the peep show licensing ordinance survived several constitutional

challenges, the court affirms the judgment.

Gilbert H. Levy, for appellant.

LeSourd & Patten, P.S., and Michael R. Kenyon, for respondent.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WORLD WIDE VIDEO, INC.,	)	
	)	56619-4
Appellant,	)	
	)	
v.	)	En Banc
	)	
THE CITY OF TUKWILA,	)	Filed September 19, 1991
Respondent.	)	

DOLLIVER, J.--An adult bookstore sued the City of Tukwila, alleging the City's new adult entertainment zoning ordinance unduly restricted free speech. At trial, the zoning ordinance was declared unconstitutional, while the City's peep show licensing ordinance was upheld against the same challenge. Both parties appealed and direct review was granted. We affirm the trial court on both issues.

Since late 1987, World Wide Video, Inc. (WWV) has operated an adult entertainment establishment in the City

of Tukwila (Tukwila). In addition to selling and renting sexually explicit magazines, novelties, and videotapes, WWV has eight panoram, or peep show, booths on the premises. WWV is located in a commercial zone and directly abuts a residential zone.

A few months after WWV began operations in Tukwila, the City began a review of its existing adult entertainment legislation. Various materials were considered in the course of the review, including but not limited to Tukwila's existing adult motion picture ordinance, adult use studies prepared by the Cities of Des Moines and Kent, materials prepared by an anti-pornography group, certain applicable United States Supreme Court and Washington Supreme Court cases, and information provided by an assistant police chief of the City of Renton. The

results of the review led to the consideration and adoption, in June 1988, of Tukwila Ordinance 1465 (amending Tukwila Municipal Code (TMC) 18.06.825).

Ordinance 1465 regulates adult motion picture theaters, adult bookstores, adult video stores, adult retail stores, and other adult uses. Such adult uses are permitted in Tukwila only within the M-2 heavy industrial zone. Within the M-2 zone, adult entertainment establishments must meet various dispersion requirements. The trial court found similar combination concentration/dispersion zoning plans have been utilized in other communities in Washington.

Tukwila Ordinance 1475 (TMC 5.52), passed later in 1988, regulates panorams, or peep shows. It includes provisions requiring an applicant to acquire a panoram premises license ($100 annual

license fee), panoram device licenses for each peep show on the premises ($50 annual license fee), and a panoram operator's license for each operator ($725 annual license fee). Applicants for such licenses must provide certain information, including "[t]he name, address and telephone number of each person holding an ownership, leasehold or [some sections include the word 'other'] interest in the panoram [premises or device]". See TMC 5.52.060(b)(1)(B), (2)(B), (3)(B). The City Clerk is required to issue the licenses, or the reasons for nonissuance, within 30 days after the date of filing any application. The 30-day period is intended to provide time for various necessary investigations by the police department, health department, etc.

In addition to the foregoing, Ordinance 1475 includes various

requirements regarding the configuration of peep show booths: Doors must be cut at least 42 inches from the floor; there may be no openings in the partitions between booths except close to the floor and the ceiling; the booths must not be locked; lighting must be equal throughout the premises; and booths must not have any seating surface if they have a door or curtain. WWV does not comply with any of these requirements.

Tukwila does not deny the speech engaged in by WWV is protected under the first amendment to the United States Constitution and under article 1, section 5 of the Washington Constitution. Both the zoning ordinance and the panoram ordinance thus affect protected speech. WWV brought suit in Superior Court challenging the constitutionality of the new adult entertainment zoning ordinance, and seeking injunctive and declaratory

relief. WWV alleged free speech, due process and equal protection violations under the United States Constitution and article 1, section 5 of the Washington Constitution. Tukwila answered and counter-claimed, seeking injunctive relief based on WWV's noncompliance with Tukwila's panoram licensing ordinance. WWV answered the counterclaim by alleging that the panoram ordinance was also constitutionally defective. The hearing on the motions was consolidated with trial on the merits, and the case was tried to the court. The trial court found in favor of WWV on the constitutionality of the zoning ordinance and in favor of Tukwila on the panoram licensing ordinance. Both parties appealed.

II

Each party assigns error to several of the trial court's findings of fact.

> In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.

(Citations omitted.) Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). We believe the trial court did an excellent job of making specific, well-supported findings of fact. The only finding of fact we find not to be supported by substantial evidence is finding of fact 45:

> The City Police Department would require approximately two full days to investigate each . . . additional operator's license.

Because most of the information required in connection with the operator's license is based on the business rather than on the individual operator, investigations of additional operator's licenses would likely take far less than 2 days each. We agree with plaintiff there is neither

testimony nor reasonable inference from the testimony to support finding of fact 45. Our rejection of this finding of fact, however, has no impact on the outcome of the case.

III

Although article 1, section 5 provides greater protection for speech rights than does the United States Constitution, O'Day v. King Cy., 109 Wn.2d 796, 802, 749 P.2d 142 (1988), federal law operates as a floor for speech protection, above which article 1, section 5 operates only when appropriate. When we believe a statute to be clearly in violation of the United States Constitution, as we do here with regard to Ordinance 1465, the zoning statute, it is unnecessary to enunciate a state rule and we do not do so. We look, therefore, to federal law to determine the minimum limits of protection in this area, while

emphasizing that our application of the federal standard does not constitute its adoption as the Washington standard.

In 1986, the United States Supreme Court ruled on a Renton ordinance that regulated the location of adult motion picture theaters. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S. Ct. 925 (1986). Renton's status as the leading federal case regarding zoning of adult businesses was not altered by the recent Supreme Court decision in Barnes v. Glen Theatre, Inc., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 59 U.S.L.W. 4745 (U.S. June 21, 1991), upholding a statute prohibiting public nudity against an attack by entities wishing to provide live nude dancing. The Barnes plurality stated that nude dancing is expressive conduct or "symbolic speech" which, under United States v. O'Brien, 391 U.S. 367,

20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), is not entitled to full First Amendment protection. See Barnes, 59 U.S.L.W. at 4747. In contrast, the written or filmed materials distributed by WWV are "pure" speech for the purposes of the First Amendment. By its own terms, the Barnes decision does not apply to "pure" speech; thus Renton remains the appropriate starting point for cases of this type.

At the outset, the Renton Court stated:

> This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

(Citations omitted.) Renton, 475 U.S. at 46-47. The "substantial governmental interest" shown in Renton was that of

combatting the undesirable secondary effects of adult theaters. In a statement crucial to this case, the Renton Court noted:

> [T]he Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in Schad v. Mount Ephraim, 452 U.S. 61[, 68 L. Ed. 2d 671, 101 S. Ct. 2176] (1981), and Erznoznik v. City of Jacksonville, 422 U.S. 205[, 45 L. Ed. 2d 125, 95 S. Ct. 2268] (1975).

Renton, 475 U.S. at 52. In contrast, Tukwila has not shown that adult businesses with predominantly "take-home" merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the "substantial governmental interest" portion of the test has not been met. Moreover, Ordinance 1465 includes in its definition

of adult bookstore, retail store, or video store any establishment in which:

> a. Ten percent or more of the "stock-in-trade" consists of [merchandise] distinguished or characterized by an emphasis on... "specified sexual activities" or "specified anatomical areas"; and/or
> b. any person is excluded by virtue of age from all or part of the premises generally held open to the public where such [merchandise] is displayed or sold.

TMC 18.06.825(a)(2)(A) and (B); see TMC 18.06.825(a)(6), (8). This definition would even include "mainstream" video stores that have restricted adult sections. Yet the trial court, in an unchallenged finding of fact, specifically found:

> None of the sources considered by Mr. Pace in conducting his study indicate that businesses which have their stock in trade limited to ten and a half percent sexually explicit material caused the same type of adverse secondary effect as businesses which have one hundred percent sexually explicit material.

Finding of fact 27. Again, no substantial governmental interest has

been demonstrated. Therefore, the Tukwila ordinance is not sufficiently "narrowly tailored" to meet the federal standard.

Tukwila argues it should be permitted "to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance", as the Supreme Court held the City of Renton was entitled to do. Renton, 475 U.S. at 51. However, that entitlement was qualified. The Supreme Court held a city could rely on evidence generated by others, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Renton, 475 U.S. at 51-52. The Tukwila ordinance does not pass this test; it strives to regulate forms of expressive activity different from those studied in the materials upon which it relies. Because

Tukwila has shown no substantial governmental interest that is served by regulating the numerous types of businesses covered by Ordinance 1465, the ordinance is unconstitutional under the United States Constitution. We need not, and therefore do not, reach the question whether the ordinance "unreasonably limit[s] alternative avenues of communication".

We note also that the Ninth Circuit stated, subsequent to Renton, that

> five . . . justices in Young [v. American Mini Theatres. Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),] concluded that the degree of protection the first amendment affords speech does not vary with the social value ascribed to that speech by the courts. This view continues to govern.

(Citations omitted.) Kev, Inc. v. Kitsap Cy., 793 F.2d 1053, 1058 (9th Cir. 1986). Thus a decision that pornography, though protected, should receive less protection than other types of speech would be

constitutionally questionable at best, even under federal standards.

IV

WWV argues the panoram licensing ordinance is unconstitutional under Acorn Invs., Inc. v. Seattle, 887 F.2d 219 (9th Cir. 1989) and FW/PBS, Inc. v. Dallas, ___ U.S. ___, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). Although we reach a different conclusion than the one urged by WWV, these cases are indeed helpful in analyzing the Tukwila ordinance. As no argument was made pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), for an application of Washington law to this issue, our analysis is only under federal law. We make no statement regarding whether the Washington constitution might support a different standard for licensing of this type.

License Fees.

WWV challenges the trial court's determination that the license fee provisions of TMC 5.52.050(a) are constitutional. Tukwila argues the fees are valid because they are based on the estimated time and cost involved in investigating license applications. Our rejection of finding of fact 45 is not fatal to this argument because there are likely to be other costs associated with the license system which were not made evident at trial. The inspections by entities other than the police department, for example, will not be without cost to the City. Thus, because the exact costs to Tukwila of the licensing procedure are unclear from the evidence presented and it is not always possible to estimate with precision the costs of a new licensing system, we are not prepared at this time to hold that

the fees are excessive. If at a later date WWV could show the fees to be unreasonable in light of the actual costs to the City of administering the licensing program, as was done in Acorn, a successful challenge might then be brought.

Disclosure Provisions.

Next, WWV challenges the trial court's determination that the ownership disclosure provisions of TMC 5.52.060(b) are constitutional. Relying primarily on Acorn, WWV argues the "or other interest" language in the ordinance is chilling because it arguably requires disclosure of too much information. The Seattle ordinance at issue in Acorn called for disclosure of the names of all shareholders. The Ninth Circuit held:

> Because officers and directors, not shareholders, are legally responsible for the management of a corporation's business, . . . there is no logical connection between the

> City's legitimate interest in compliance with the panoram ordinance and the rule requiring disclosure of the names of shareholders.

Acorn, 887 F.2d at 226.

Tukwila's "other interest" requirement could be construed to include persons with a relatively minor interest in the business, such as shareholders, and if so construed the ordinance would be unconstitutional. However, "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." State v. Browet, Inc., 103 Wn.2d 215, 219, 691 P.2d 571 (1984). "The same rules of statutory construction apply to municipal ordinances as to state statutes." Spokane v. Fischer, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988). Therefore, we construe the ownership disclosure provisions of TMC 5.52.060(b) as requiring disclosure of all persons who

hold an interest similar to that of an owner or leaseholder--an "other significant interest", with significance being based on responsibility for management of the business, as indicated in Acorn. This construction also satisfies WWV's vagueness concerns by eliminating any inappropriate discretion that might have been vested in the licensing official. As so construed, the ordinance meets federal constitutional standards.

Configuration Requirements.

WWV further challenges the trial court's determination that the illumination requirement in TMC 5.52.110(4) (referred to as 5.52.110(D) in Ordinance 1475) is constitutional. In Acorn, the court approved of the portion of the Seattle ordinance requiring that peep show booths "be sufficiently illuminated so that someone outside can

determine the number of persons inside". Acorn, 887 F.2d at 223. WWV argues the Tukwila ordinance goes too far in requiring equal lighting throughout the premises rather than merely "sufficient" lighting. The trial court disagreed. We affirm. The minor difference from the ordinance noted in Acorn is within the community's discretion and is not unconstitutional.

Time Period for Issuance.

Finally, WWV challenges the trial court's determination that the 30-day maximum approval period in TMC 5.52.080(a) is constitutional. Contrary to WWV's argument, 30 days is not necessarily too long a period, given the various inspections and investigations which must take place before licensing. In FW/PBS, the United States Supreme Court struck down a Dallas ordinance relating to regulation of "sexually

oriented businesses" (including panoram-type businesses) because it "[did] not provide for an effective limitation on the time within which the licensor's decision must be made." FW/PBS, 110 S. Ct. at 606. The Court stated the following requirements:

> [1 T]he licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and [2] there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

FW/PBS, 110 S. Ct. at 606.

The Dallas ordinance, like the Tukwila ordinance, called for approval of license applications "within 30 days after receipt of an application", FW/PBS, 110 S. Ct. at 605; see TMC 5.52.080. In Dallas, as in Tukwila, certain health and safety inspections were required before a license might be approved. FW/PBS, 110 S. Ct. at 605; see TMC 5.52.060(a),

.080(b)(1). The Court found the Dallas ordinance unacceptable, not because of the 30-day time period, but rather because it "provide[d] no means by which an applicant [might] ensure that the business [be] inspected within the 30-day time period within which the license [was] purportedly to be issued if approved." FW/PBS, 110 S. Ct. at 605. The Supreme Court did not find the 30-day period inherently problematic. Its disapproval of the Dallas ordinance was instead based on the absence of any remedy if the City failed to issue a license within those 30 days.

There is thus one crucial difference between the Dallas and Tukwila ordinances: The Tukwila ordinance contains provisions for appeal if a license is denied. The Supreme Court noted that the procedures described in the Dallas ordinance

> [do] not place any limits on the time within which the city will inspect the business and thereby make the business eligible for the sexually oriented business license. Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license.

FW/PBS, 110 S. Ct. at 606. In contrast, TMC 5.52.100(a) provides for review by "the city board of adjustment, or . . . such other hearing body as may hereafter be established by the city council for the hearing of such appeals". The hearing must take place within 20 days after notice of appeal is timely filed, and "[t]he filing of such appeal shall stay the action of the clerk, pending the decision of the hearing body." TMC 5.52.100(b). The Tukwila ordinance further provides that the decision of the hearing body may be appealed to the Superior Court. TMC 5.52.100(e). As long as these procedures for appeal are not used as a means of unreasonably

delaying issuance of licenses, they are sufficient to satisfy the FW/PBS test.

V

The decision of the trial court is affirmed.

_____

WE CONCUR:

_____ _____

_____ _____

_____ _____

_____ _____

World Wide Video v. Tukwila
Majority by Dolliver, J.
Concurrence/dissent by Dore, C.J.

No. 56619-4

DORE, C.J. (concurring/dissenting) -- I concur with the majority's decision upholding the peep show licensing ordinance, but I dissent from its holding that the adult bookstore zoning ordinance is unconstitutional. Tukwila or any other municipality should be free to manage commercial development by zoning procedures. That means the city may determine where adult bookstores should be located, so long as this determination (1) only affects protected speech slightly or neutrally and (2) furthers the city's "great interest" in neighborhood quality. Northend Cinema Inc. v. Seattle, 90 Wn.2d 709, 718, 585 P.2d 1153, 1 A.L.R.4th 1284 (1978), cert. denied, 441 U.S. 946 (1979).

World Wide Video, the challenger to the zoning ordinance in question, operates an adult bookstore and peepshows in a commercial zone bordering a residential area of Tukwila. World Wide Video argues that the zoning is an unconstitutional restriction on expression. Tukwila's ordinance segregates adult bookstores and peepshows to one area, the M-2 heavy industrial zone, but does not prohibit their operation. This ordinance resulted from a planning study that considered other cities' experiences in zoning adult businesses. Tukwila's method concentrated these businesses in an area comprising about one-fifth of the city.

The majority concludes that Tukwila does not show the substantial governmental interest that Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986),

required. In Renton, the Court upheld as constitutional the city's effort to establish 1,000-foot buffers between adult movie theaters and residential areas, churches, parks and schools. Renton established the City's substantial governmental interest to be in furthering neighborhood quality by traditional zoning powers, which amounts to time, place or manner restrictions on expression where the effect on speech content is neutral. 475 U.S. at 47.

> In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters.... Renton has not used "the power to zone as a pretext for suppressing expression," ... but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning.

475 U.S. at 54.

Here, the majority reasons that Tukwila improperly founded its adult bookstore and peepshow ordinance on the experiences of other cities regulating adult theaters because Tukwila's zoning regulates a predominantly take-home business, different in nature from adult movie theaters. Majority, at 8-9. Moreover, the majority calls Tukwila's definition of adult bookstores so broad[1]

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[1]Tukwila Ordinance 1465 defines "adult entertainment establishments" as including:

> 2. "Adult bookstore" is a retail establishment in which:
>
> a. Ten percent or more of the "stock in trade" consists of books, magazines, posters, pictures, periodicals or other printed materials distinguished or chacterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or
>
> b. Any person is excluded by virtue of age from all or part of the premises generally held open to the public where such material is displayed or sold.

that it arguably includes "mainstream" video stores, thus compounding the City's failure to show a "narrowly tailored" substantial governmental interest. Majority, at 8.

Renton and its predecessor, Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), unmistakably address the need for cities to protect neighborhoods against the insidious effects of adult entertainment -- just as cities traditionally control other commercial development. We recognized the same value in Northend Cinema.

Tukwila's need to control development and its effects is the substantial governmental interest that Renton requires. Therefore, the City is restricted in exercising that need only

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Former TMC 18.06.825(A)(2)(a), (b).

by assuring "reasonable alternative avenues of communication." Renton, 475 U.S. at 50. The City's "'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" Renton, at 50, (quoting Young, 427 U.S. at 71). Likewise, our focus in Northend Cinema as now, narrowed on the city's determination to control unwanted secondary effects of adult businesses in otherwise serene neighborhoods.

The majority catches one phrase of the proper analysis. But it misses the point by finding Tukwila's ordinance is not so narrowly tailored to meet Renton's substantial governmental interest test. In Renton plaintiffs objected to zoning that established certain buffers between adult movie houses and residential areas, churches and schools. The Court rejected the argument that Renton improperly

enacted its zoning regulation because it did not conduct studies specifically related to Renton's problems. 475 U.S. at 50. Then the Court stated:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

(Italics mine.) 475 U.S. at 51-52. The protected interest is neighborhood quality, so the relevance the majority finds lacking is the riddance of the same obnoxious effects associated with an adult business clientele, whether at movie theaters or peepshows. See, e.g., Clerk's Papers, at 376 (Deposition of World Wide Video manager, discussing evidence of masturbation in peep show stalls).

The majority also overlooks one critical distinction in reaching its

conclusions. Ordinances at issue in Renton and Young each were broad enough to cover the type of adult business World Wide Video operates in Tukwila. For example, Renton's zoning ordinance defined an adult theater as

> " [a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'... for observation by patrons therein."

Renton, 475 U.S. at 44. Thus, by its terms, the Renton ordinance arguably includes peepshows. In Young the plaintiffs challenged the constitutionality of a zoning ordinance regulating adult bookstores as well as adult movie theaters. Young, 427 U.S. at 53 n.5.

Recognizing that Renton built on Young[2] gives substance to broad language in those decisions emphasizing that the issue is zoning regulation and not speech restriction. The nuisance is blight, not unpopular expression. Regulation of blight, of the unwanted secondary effects associated with businesses that purvey explicit sexual books, tapes, gags and peep shows, is proper commercial zoning. The narrow tailoring that the majority complains is missing in Tukwila's ordinance I find easily discerned in the City's categorization of adult businesses that sell and show explicit materials, so designated to protect the quality of city neighborhoods. Cf. Renton, 475 U.S. at 52 ("the Renton ordinance is 'narrowly tailored' to affect only that category of

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[2]"In our view, the resolution of this case is largely dictated by our decision in Young v. American Mini Theaters, Inc. []" 475 U.S. at 46.

theaters shown to produce the unwanted secondary effects").

In addition, the Court in Renton appeared to disregard the subtle difference between adult movie theaters, on one hand, and other adult businesses. Rejecting an argument that the Renton ordinance was under-inclusive, because it affected only adult theaters, the Court stated:

> That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.

475 U.S. at 52-53. (Citation omitted. Italics mine). My added emphasis is noteworthy because the Court did not say "other kinds of adult businesses that can

be shown...." This emphasis bolsters my conclusion that Tukwila reasonably believed other cities' studies on the secondary effects of adult businesses were relevant to its zoning consideration. Many courts that have considered adult business zoning restrictions have adapted Renton's reasoning easily to uses broader than adult movies. See, e.g., Walker v. Kansas City, 911 F.2d 80 (8th Cir. 1990) (go-go dancing) cert. denied, ___, U.S. ___, 114 L.Ed.2d 476, 111 S.Ct.2234 (1991); Thames Enters., Inc. v. St. Louis, 851 F.2d 199 (8th Cir. 1988) (adult bookstores, theaters, peep shows, massage parlors); 7250 Corp. v. County Commissioners, 799 P.2d 917 (Colo. 1990) (time restrictions on nude dancing); County of Cook v. Renaissance Arcade & Bookstore, 122 Ill.2d 123, 522 N.E.2d 73 (1988) (bookstores, mini-theatres),

dismissed, 488 U.S. 882 (1988); Montague v. Cedar Rapids, 449 N.W.2d 91 (Iowa Ct. App. 1989)(bookstores); Islip v. Caviglia, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (Ct. App. 1989)("adult uses", including bookstores, cabarets).

Tukwila's ordinance is, in the end, reasonable zoning, as the Court found the ordinance to be in Renton. 475 U.S. at 54; cf. Barnes v. Glen Theatre. Inc., ___, U.S. ___, 115 L.Ed.2d 504 ___ S.Ct. ___ (1991) (Souter, J., concurring)(ban on nude public dancing furthers substantial state interest in combating secondary effects of adult entertainment establishments).

The majority misses the singular reasoning in Renton, Young, and Northend Cinema: A city can determine where adult bookstores or peepshows or full-screen adult movie theaters can be located on

the basis of its substantial interest in neighborhood quality, so long as it does not prohibit these businesses altogether. Here, Tukwila has not employed "'the power to zone as a pretext for suppressing expression" and seeks principally to preserve the "quality of life in the community at large". 475 U.S. at 54.

I would hold that the city properly zoned adult bookstores to one area and that the ordinance is not unconstitutional. I would affirm the decision of the City of Tukwila and reverse the trial court.

DORE, C.J.

DURHAM, J.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

WORLD WIDE VIDEO, INC., a Washington corporation,	)	NO. 88-2-15526-7
Plaintiff,	)	
v.	)	COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
CITY OF TUKWILA,	)	
Defendant.	)	

THIS MATTER came on regularly before the undersigned Judge of the above-entitled Court for a show cause hearing on the parties' cross-motions for preliminary injunctions commencing May 9, 1989. The parties stipulated and the Court ordered that the trial on the merits in this action be consolidated with the hearing pursuant to Civil Rule 65(a)(2). The plaintiff World Wide Video, Inc., was represented by Gilbert H. Levy and the defendant City of Tukwila

was represented by LeSourd & Patten, P.S., and Michael R. Kenyon.

The Court heard the evidence, received and considered the exibits, considered the pleadings, and heard the arguments of counsel, and being otherwise fully advised in all matters, now makes the following findings of fact. (Headings are used only for purposes of organization, and do not limit the issues with respect to which findings may apply.)

FINDINGS OF FACT

1. The City of Tukwila ("City" or "Tukwila") is a municipal corporation organized under the laws of the State of Washington. It is somewhat unique in its configuration and makeup. Tukwila is a long narrow city bisected by a major interstate highway and other main thoroughfares. Running through it is the Green River. It also contains very old

communities and residential neighborhoods. The City has duly enacted a zoning code, including provisions regulating the locations of adult entertainment establishments, and a licensing ordinance regulating panorams or "peep show" booths.

2. World Wide Video, Inc. operates an adult entertainment establishment, as defined by the City's zoning code, at 14055 Interurban Avenue, within the city limits of Tukwila. World Wide Video first began operating its business in Tukwila in approximately November, 1987. World Wide Video sells and rents video tapes of an exclusively sexually explicit nature. World Wide Video additionally sells sexually explicit novelty items and magazines. World Wide Video also operates eight peep show booths within its existing location.

3. The Riverside Inn, a nightclub,

is located directly across the street from the plaintiff's business. Next door on the west is a 7-11 store. Other businesses in this locality include a card room and two taverns. To the northeast of the plaintiff's business is a public golf course.

4. The peep show booths at the World Wide Video location are approximately 36 inches wide, 42 inches long, and 84 inches tall. A peep show is operated when a customer purchases a token, enters the booth and puts the token in a slot to start a video viewing machine. The customer looks through a 13-inch screen to see the projected image.

5. The peep show booths at World Wide Video are broken into three separate groups, two of which have three booths and the third of which has two booths, for a total of eight booths. The booths

in each of the three groups are separated by partitions made of wood or other solid material, which run from the floor to within approximately four inches of the ceiling. No working lights are suspended from the ceiling above any of the peep show booths. The partitions separating the booths have holes in them approximately 36 inches from the floor. World Wide Videc had been aware that lewd conduct had occurred in the booths prior to the commencement of this action.

6. World Wide Video's current location is in a C-2 commercial zone and directly abuts a residential zone. World Wide Video has operated its peep shows within 1,000 feet of a residential zone since its business opened.

Enactment of New Adult Entertainment Legislation

7. In approximately January, 1988, Tukwila Senior Planner Jack Pace was

asked by Rick Beeler, the Planning Director, to review the City's existing adult entertainment provisions. This review was a specific item in the City's 1988 budget, which had been adopted in December, 1987.

8. In doing his study, Mr. Pace gathered information from various sources. Mr. Pace undertook his review without any preconceived notion of what his result would be. He did not set out to ban World Wide Video or adult entertainment in general from the city of Tukwila.

9. Mr. Pace began his review of adult entertainment in January, 1988. It occupied approximately 40% of his time from January through June 6, 1988, when the ordinance was adopted by the City Council. The ordinance became effective on June 17, 1988.

10. Mr. Pace considered various

materials in conducting his assignment. These included without limitation the following:

a. Tukwila's existing adult motion picture ordinance;

b. The final report prepared by the Attorney General's Commission on pornography (the "Meese Commission Report");

c. A publication entitled "Regulating Sex Businesses", prepared by Planning Advisory Service, a publication of the American Society of Planning Officials;

d. The Adult Use Study prepared by the City of Des Moines, Washington;

e. The Adult Use Zoning Study prepared by the City of Kent, Washington;

f. Materials prepared by Washington Together Against Pornography, an organization which advocates legal

solutions to problems created by pornography;

g. The United States Supreme Court decisions in Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, and City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, and the Washington State Supreme Court's decision in Northend Cinema, Inc. v. Seattle, 90 Wn.2d 709; and

h. Information provided by an Assistant Police Chief of the City of Renton regarding Renton's experience with adult entertainment, who was then acting as the interim Police Chief for the City of Tukwila.

11. Mr. Pace did not intentionally exclude any materials on the topic of adult entertainment from his review, nor did he refuse to consider any materials submitted.

12. Mr. Pace's efforts culminated

in his preparation of a Staff Report to the Planning Commission dated March 7, 1988. Mr. Pace completed his study in March, 1988, and issued a report to the Tukwila City Council. Ordinance No. 1465, which went into effect in June, 1988, was based on his report.

13. The Planning Commission of the City of Tukwila held several public hearings on the adult entertainment issue, received testimony and exhibits, and deliberated the issue of appropriate land-use regulations for adult entertainment.

14. As a result, the Planning Commission recommended to the City Council that the proposed adult entertainment ordinance be adopted. Trial Ex. 31 at 1.

15. The City Council of the City of Tukwila adopted Ordinance No. 1465 regarding adult entertainment uses.

16. The City Council relied on Mr. Pace's Staff Report and its attachments regarding the adoption of Ordinance 1465.

The Adult Entertainment Ordinance

17. Ordinance 1465 defines adult entertainment establishments to include adult motion picture theaters, adult bookstores, adult video stores, adult retail stores, and other adult uses. World Wide Video has stipulated that it is an adult entertainment establishment under Ordinance 1465.

18. Ordinance 1465 provides that adult entertainment establishments are permitted uses within the city of Tukwila in the M-2 zones.

19. The city of Tukwila has approximately 1100 acres zoned M-2. This comprises approximately 21% of the total area of the city.

20. Within the M-2 zones, Ordinance

1465 requires that adult entertainment establishments meet certain dispersion requirements regarding proximity to residential zones, schools, churches, other adult entertainment establishments, and certain other uses. This combination zoning plan, including concentration aspects (limiting adult entertainment to the M-2 zone) and dispersion aspects (requiring separation between certain enumerated uses within the M-2 zone) is not unusual and has been utilized in the city of Kent, Washington, and other surrounding communities.

21. Ordinance 1465 further provides that nonconforming adult entertainment establishments must have terminated or discontinued within 90 days of the effective date of the ordinance, or by September 15, 1988. World Wide Video has known of the enactment of Ordinance 1465 since its effective date and has taken no

action to attempt to secure a new location for its business.

22. In conducting his study, Mr. Pace did not attempt to determine whether or not the plaintiff's business caused depreciation of property values in the neighborhood in which it is located. No evidence has been presented that the plaintiff's business has caused depreciation of property values.

23. At the time that Mr. Pace undertook his study, the City of Tukwila had the opportunity to study the actual effects of an adult entertainment business within its confines and failed to do so. The Planning Department's study and the legislative record before the City Council contain no evidence or testimony concerning the effects, good or bad, from the business that exist and which is the only business of its kind in the City of Tukwila.

24. The plaintiff's business is the only business in the City of Tukwila where all merchandise is of a sexually explicit nature.

25. The City of Tukwila Police Department maintains computerized summaries of crime reports for reporting district 20, which is the area along Interurban Avenue South between I-5 and I-405. These summaries list businesses and buildings in this area by the address and indicate the nature and number of police calls to each address. The plaintiff introduced into evidence the crime reports for reporting district 20 covering the period between November, 1987, and January, 1989.

26. The crime reports indicate that other businesses and buildings in reporting district 20 have generated more crime during the time period in question than the plaintiffs' business.

27. None of the sources considered by Mr. Pace in conducting his study indicate that businesses which have their stock in trade limited to ten and a half percent sexually explicit material caused the same type of adverse secondary effect as businesses which have one hundred percent sexually explicit material.

28. The Staff Report concludes that the purpose of Ordinance 1465 is not to ban adult entertainment, but to designate appropriate locations and to develop standards for adult entertainment uses. Trial Ex. 2 at 9.

29. Ordinance 1465 regulates only the places where adult entertainment establishments can locate. It does not address the content of any materials sold, rented, or exhibited.

30. There is no evidence of investment by World Wide Video at its current location and its lease provides

that it can engage only in legal uses. Trial Ex. 24 at ¶ 6.1. The lease further provides that the lease shall be terminated if World Wide Video is denied proper licenses to conduct its business. Trial Ex. 24 at Ex. B, ¶ 6.

31. Ordinance No. 1465 relegates "adult entertainment establishments" to the M-2 heavy industrial zone.

32. At the time that Ordinance No. 1465 was enacted, the M-2 zone consisted of approximately 100 acres located south of 180th and east of Southcenter Parkway Blvd. The southern section of the M-2 zone consists of admittedly neat warehouses, in the Southcenter Parkway area, with office space on the front side of those warehouses, with neatly manicured lawns, but with no retail businesses.

33. The principal landowner in the southern section of the M-2 zone is the

Segale Corporation. When asked, Segale Corporation responded to plaintiff's representative that it would not lease space to adult entertainment businesses.

34. The only space in the southern section of the M-2 zone that would support a retail business is a parking lot across the street from the Pavillion Shopping Mall. The lot is not for sale and is not available for rent by the landlord, according to an agent of its lessee.

35. Since Ordinance No. 1465 was adopted, large tracts of land have been annexed by the City of Tukwila. These annexations created new segments of the M-2 heavy industrial zone, running north from the preannexation northern boundary of the City of Tukwila to the southern boundary of the City of Seattle.

36. The northern section of the M-2 zone consists of parking lots, Metro

Transit facilities, the Boeing Plant and huge chain link fences along the road. The few retail businesses located in the area are geared to automotive goods. There is no foot traffic in the area, no sidewalks or retail businesses conducive to customers walking into a bookstore.

37. In the northern section, the spaces that appeared to be available from the presence of "For Lease" signs consisted of warehouses and huge spaces for operations larger than a small business. The landlords for these spaces who were contacted by the plaintiff's representative would not lease to an adult bookstore.

38. The court finds that there is no land available in the M-2 zone which would support a small retail business such as that belonging to the plaintiff.

The Panoram Licensing Ordinance

39. The City Council of the City of Tukwila passed Ordinance 1475 regulating panorams, or peep shows, on September 6, 1988. Ordinance 1475 became effective September 14, 1988.

40. Ordinance 1475 includes provisions requiring an applicant to acquire a panoram premises license ($100 annual license fee), panoram device licenses for each peep show on the premises ($50 annual license fee), and a panoram operator's license for each operator ($725 annual license fee).

41. The City Clerk is required to issue the licenses, or the reasons for nonissuance, within 30 days after the date of filing any application.

42. The 30-day period is to provide sufficient time for the City Police Department, City Development Review Committee, City Fire Department, and

County Health Department to perform investigations and provide information to the Clerk regarding compliance of the premises and panoram devices with all applicable laws and ordinances.

43. The City Police Department would require two full days, at a cost of approximately $288, to conduct the required investigations for one of each of the three required panoram licenses. The information required to be given is substantially the same for each of the three licenses.

44. World Wide Video is open for business 24 hours a day, 7 days a week. The peep show booths are in operation at all times. Three different clerks each work one 8-hour shift per day. Each such clerk would require a panoram operator's license under Ordinance 1475.

45. The City Police Department would require approximately two full days

to investigate each such additional operator's license.

46. World Wide Video has not applied for nor received any of the licenses required under Ordinance 1475.

47. Ordinance 1475 further requires that:

a. The bottoms of the doors on the panoram booths be at least 42 inches from the floor. Except for a four day period on one of the eight panoram booths done at the request of World Wide Video's counsel, the doors on the peep shows have been flush with the floor.

b. Any openings for ventilation or other purposes in the partitions between the panoram booths must be no higher than 12 inches from the floor nor lower than 84 inches from the floor. The holes in the partitions at World Wide Video are approximately 36 inches from the floor.

c. The peep show booths are not to be locked. The peep show booths at World Wide Video can and have been locked from the inside by patrons.

d. The premises where peep shows are located must maintain illumination equally distributed throughout the premises at all times when the business is open or when the public is permitted to enter. World Wide Video does not have working lights above the peep show booths and the illumination is not equally distributed.

e. The peep show booths are not to contain a chair or seating surface, if they have doors or other screening devices at their entrances. World Wide Video's peep show booths contain both doors and chairs.

The Changing Nature of the City of Tukwila

48. Prior to March, 1989, the City of Tukwila had a population of approximately 4,800 people and covered an area of approximately 2,800 acres.

49. In March, 1989, the last of four annexations into the city of Tukwila was approved by voters. The result of the four annexations was to increase the population of Tukwila to approximately 12,600 people and to increase the size of the City to approximately 5,150 acres.

50. Before the annexations, Tukwila had approximately 101 acres of M-2 zone. After the annexations, the M-2 zone in Tukwila totaled approximately 1,100 acres.

51. Mr. Pace was aware, when he was reviewing adult entertainment materials, of the potential that the City would successfully annex the four areas. He

considered the potential of successful annexations in preparing his Staff Report and the proposed adult entertainment ordinance, which later became Ordinance 1465.

52. The M-2 zone in Tukwila is denominated "heavy industrial". The M-2 zones in Tukwila are not, however, typical heavy industrial areas. They contain a mixture of office parks with substantial landscaping, retail and residential uses, light manufacturing and warehouses, and one steel plant. The Boeing Company headquarters and airfield are within the M-2 zone in Tukwila.

53. Space is available for lease in the M-2 zone.

54. The M-2 zones in Tukwila are largely broken into two areas. The first is south of 180th Street and the second is largely to the north of World Wide Video's existing location. Trial Ex. 27.

55. A retail mall called "The Pavillion" is located directly across 180th Street from the southern M-2 zone in Tukwila. The Pavillion has approximately 35 retail stores, between 130,000 and 160,000 visitors each month, and parking spaces for approximately 1,000 vehicles. 492 of the parking spaces are located in the M-2 zone across 180th Street from The Pavilion. Additionally, retail space called Parkway Plaza extends directly north from The Pavilion for approximately 7 blocks on the east side of Southcenter Parkway. Retail space extends directly north from The Pavilion for approximately one mile on the west side of Southcenter Parkway.

56. Other retail outlets exist in the other M-2 zones in Tukwila, generally to the north of World Wide Video's existing location. These include, without limitation, taverns, restaurants

and a bakery thrift store.

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to and the subject matter of this litigation.

2. The plaintiff is engaged in a form of speech which is fully protected by the First Amendment to the United States Constitution and Article 1, Section 5 of the Washington Constitution.

3. The Court finds that Ordinance No. 1465 unconstitutionally restricts free speech because adult entertainment establishments are not afforded a reasonable opportunity to find a location in the City of Tukwila.

4. Since Ordinance No. 1465 fails to afford adult entertainment

establishments a reasonable opportunity to conduct business in the City of Tukwila, it fails to provide adequate alternative channels of communication for this type of business. The ordinance is therefore not a valid time, place and manner restriction under the First and Fourteenth Amendments to the United States Constitution. For the same reason, and as a separate and independent grounds for this decision, the ordinance violates Article 1, Sec. 5 of the Washington Constitution.

5. To meet the required governmental interest standard, the legislative body which adopts the Ordinance must consider the actual impacts of adult entertainment businesses within its boundaries, if such evidence is available. Here, since the evidence was available and not considered by the Tukwila City Council prior to the

enactment of Ordinance No. 1465, the Ordinance has not been shown to satisfy the required governmental interest. Therefore, the Ordinance is not a valid time, place and manner restriction.

6. Since there is no evidence that businesses which sell or lease ten and a half percent sexually explicit material cause adverse secondary effects, the definitional sections contained in Tukwila Municipal Code, Section 18.06.825, as provided by Ordinance No. 1465, which apply to the Plaintiff's business, fail to measure up to the substantial governmental interest standard. The Ordinance therefore violates the First and Fourteenth Amendments to the United States Constitution.

7. Under the First Amendment to the United States Constitution, time, place and manner restrictions are measured

against the substantial governmental interest standard.

8. The Ordinance No. 1465 on its face and in its entirety violates the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 5 of the Washington Constitution and is therefore null and void. The defendant should therefore be permanently restrained and enjoined from enforcing the ordinance.

9. The panoram licensing ordinance, Ordinance 1475, is a constitutional exercise of the City's power to regulate businesses by licensing. Ordinance 1475 does not constitute a prior restraint because it does not attempt to regulate any materials shown on the panoram devices. The City Clerk's duties pursuant to Ordinance 1475 are clear and easily understandable, and do not provide the City Clerk with undue discretion.

The 30-day time limit in which the Clerk must issue panoram licenses is reasonable so that the various city and county agencies can perform the required inspections. The license fees charged are reasonably related to the costs of the inspections and are not so excessive as to be confiscatory. The premises configurations regarding door heights, ventilation holes, chairs and other requirements are reasonable, serve a legitimate law enforcement purpose and affect only the interior of the peep show booths and not the content of any materials shown.

10. The City of Tukwila has met the prerequisites for the issuance of a permanent injunction on the panoram licensing issue, and World Wide Video should be and hereby is enjoined from conducting its panoram business without first coming into compliance with the

licenses application and premises regulation requirements of Ordinance 1475.

11. Tukwila Municipal Code Ch. 18.06.825, as in effect prior to the effective date of Ordinance No. 1465 remains in effect since the relevant amendments incorporated within Ordinance No. 1465 have been declared unconstitutional.

12. Judgment in this matter should include an appropriate injunction. Judgment in this matter shall be a final judgment for purposes of appeal.

DONE IN OPEN COURT on October 26, 1989.

_____
HON. MARY WICKS BRUCKER
JUDGE OF THE SUPERIOR COURT

COPY RECEIVED, NOTICE
OF PRESENTATION WAIVED:

LESOURD & PATTEN, P.S.

_____
Michael R. Kenyon
Attorneys for Defendant
City of Tukwila

COPY RECEIVED, NOTICE
OF PRESENTATION WAIVED:

_____
Gilbert H. Levy
Attorneys for Plaintiff
World Wide Video, Inc.

Notice of presentation is waived by the Plaintiff with the understanding that the parties have agreed that the Plaintiff may file a written objection to Conclusion of Law No. 11, and such written objection shall be treated for purposes of an appeal as if it were made in open court and denied.

Gilbert H. Levy
Michael R. Kenyon
Mary W. Brucker

APPENDIX C

THE SUPREME COURT OF WASHINGTON

WORLD WIDE VIDEO, INC.,	)	
	)	NO. 56619-4
Appellant,	)	
	)	ORDER DENYING
v.	)	MOTIONS FOR
	)	RECONSIDERATION
THE CITY OF TUKWILA,	)	
	)	
Respondent.	)	

The Court having decided by majority vote that the appellant's and the respondent's motions for reconsideration should be denied,

It is ordered that the motions be and they hereby are denied.

Dated this 25th day of November, 1991.

Fred H. Dore
Chief Justice

117 Wn.2d 382

APPENDIX D

CITY OF TUKWILA

Washington

ORDINANCE NO. 1465

AN ORDINANCE OF THE CITY OF TUKWILA, WASHINGTON, ESTABLISHING REGULATIONS FOR ADULT ENTERTAINMENT USES, AMENDING SECTION 18.06.825 OF THE TUKWILA MUNICIPAL CODE TO DEFINE "ADULT ENTERTAINMENT ESTABLISHMENTS", ADDING A NEW SUBSECTION 18.42.020(7) TO THE TUKWILA MUNICIPAL CODE TO ALLOW ADULT ENTERTAINMENT FACILITIES TO LOCATE IN THE M-2 (HEAVY INDUSTRY) DISTRICT, AMENDING SECTION 18.30.020(33) RELATING TO THEATERS IN C-2 ZONING DISTRICTS, AND ADDING A NEW SECTION 18.70.110 TO THE TUKWILA MUNICIPAL CODE REGARDING NONCONFORMING ADULT ENTERTAINMENT ESTABLISHMENTS.

WHEREAS, the City of Tukwila Planning Commission conducted several public hearings at which it heard testimony, reviewed exhibits, and deliberated on the issue of appropriate land use regulations governing adult entertainment establishments in the City of Tukwila, and

WHEREAS, as a result of said deliberation, the Planning Commission adopted findings and conclusions and formulated a recommendation to the City Council, and

WHEREAS, having held further public hearings on the matter and having considered the record before the Planning Commission and the recommendations of that body, the City Council concurred with those recommendations and adopted findings and conclusions, now, therefore,

THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Adult Entertainment Establishments Defined. Section 18.06.825 of the Tukwila Municipal Code is hereby amended to read as follows:

18.06.825 Adult Entertainment Establishments.

A. "Adult entertainment establishments" means adult motion picture theaters, adult drive-in theaters, adult bookstores, adult cabarets, adult video stores, adult retail stores, adult massage parlors, adult sauna parlors or adult bathhouses, which are defined as follows:

1. "Adult bathhouse" is a commercial bathhouse which excludes any person by virtue of age from all or any portion of the premises.

2. "Adult bookstore" is a retail establishment in which:

   a. Ten percent or more of the "stock in trade" consists of books, magazines, posters, pictures, periodicals or other printed materials distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas"; and/or

   b. any person is excluded by virtue of age from all or part of the premises generally held open to the public where such material is displayed or sold.

3. "Adult cabaret" is a commercial establishment which presents go-go dancers, strippers, male or female impersonators, or similar types of entertainment and which excludes any person by virtue of age from all or any portion of the premises.

4. "Adult massage parlor" is a commercial establishment in which massage or other touching of the human body is provided for a fee and which excludes any person by virtue of age from all or any portion of the premises in which such service is provided.

5. "Adult motion picture theater" is a building, enclosure, or portion thereof, used for presenting material distinguished or characterized

by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" for observation by patrons therein.

6. "Adult retail store" is a retail establishment in which:

   a. Ten percent or more of the "stock in trade" consists of items, products or equipment distinguished or characterized by an emphasis on or simulation of "specified sexual activities" or "specified anatomical areas"; and/or

   b. any person is excluded by virtue of age from all or part of the premises generally held open to the public where such items,

products or equipment are displayed or sold.

7. "Adult sauna parlor" is a commercial sauna establishment which excludes any person by virtue of age from all or any portion of the premises.

8. "Adult video store" is a retail establishment in which:

   a. Ten percent or more of the "stock in trade" consists of prerecorded video tapes, disks, or similar material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas"; and/or

b. any person is excluded by virtue of age from all or any part of the premises generally held open to the public where such prerecorded video tapes, disks or similar material are displayed or sold.

B. "Specified anatomical areas" means:

1. Less than completely and/or opaquely covered human genitals, pubic region, buttock, or female breast below a point immediately above the top of the areola.

2. Human male genitals in a discernibly turgid state even if completely or opaquely covered.

C. "Specified sexual activities" means:

1. Acts of human masturbation, sexual intercourse or sodomy; or

2. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast; or

3. Human genitals in a state of sexual stimulation or arousal.

D. "Stock in trade" means:

1. The dollar value of all products, equipment, books, magazines, posters, pictures, periodicals, prerecorded video tapes, discs, or similar material readily available for purchase, rental, viewing or use by patrons of the establishment, excluding material located in any store room or other portion of the

premises not regularly open to patrons; or

2. The number of titles of all products, equipment, books, magazines, posters, pictures, periodicals, other printed materials, prerecorded video tapes, discs, or similar material readily available for purchase, rental, viewing or use by patrons of the establishment, excluding material located in any store room or other portion of the premises not regularly open to patrons.

Section 2. Adult Entertainment Establishments allowed in M-2 District. A new subsection 18.42.020(7) is hereby added to the Tukwila Municipal Code to read as follows:

(7) Adult entertainment establishments, subject to the following location restrictions:

A. No adult entertainment establishment shall be allowed within the following distances from the following specified uses, areas or zones, whether such uses, areas or zones are located within or outside the City limits;

1. In or within 1,000 feet of any R-1, R-2, R-3, R-4, or RMH zone district or any other residentially zoned property;

2. In or within one-half mile of:

a. public or private school with curricula equivalent to elementary, junior or senior high schools, or any facility owned or operated by such schools; and

b. care centers, preschools, nursery schools or other child care facilities.

3. In or within 1,000 feet of:

a. public park, trail, or public recreational facility; or

b. church, temple, synagogue or chapel; or

c. public library.

B. The distances specified in subsection A shall be measured by following a straight line from the nearest point of the property parcel upon which the proposed use is to be located, to the nearest point of the parcel of property or land use district boundary line from which the proposed land use is to be separated.

C. No adult entertainment establishment shall be allowed to locate within

1,000 feet of an existing adult entertainment establishment. The distance specified in this section shall be measured by following a straight line between the nearest points of public entry into each establishment.

Section 3. Theaters in C-2 Districts. Section 18.30.020(33) of the Tukwila Municipal Code is hereby amended to read as follows:

(33) Theaters, except those theaters which constitute "adult entertainment establishments" as defined by this Code.

Section 4. Nonconforming Uses. A new section 18.70.110 is hereby added to the Tukwila Municipal Code to read as follows:

18.70.110 Nonconforming Adult Entertainment Establishments. Notwithstanding any other provision

of this Chapter, any adult entertainment use or establishment which is rendered nonconforming by the provisions of Ordinance 1465 of the City shall be terminated or discontinued within 90 days from the effective date of that ordinance.

Section 5. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 6. Effective Date. This ordinance shall take effect and be in full force five (5) days after publication of the attached summary which is hereby approved.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a regular meeting thereof this 6th day of June, 1988.

APPROVED:

_____
MAYOR, GARY L. VAN DUSEN

ATTEST/AUTHENTICATED:

_____
CITY CLERK, MAXINE ANDERSON

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

By_____
John F. Colgrove

FILED WITH THE CITY CLERK: 5-16-88
PASSED BY THE CITY COUNCIL: 6-6-88
PUBLISHED: 6-12-88
EFFECTIVE DATE: 6-17-88
ORDINANCE NO. 1465

(2)

No. 91-1397

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

CITY OF TUKWILA,

Petitioner,

v.

WORLD WIDE VIDEO, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

Gilbert H. Levy
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March 23, 1992

aBCD Legal Printers, Seattle, Washington

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to decide whether Tukwila Ordinance 1465 leaves open reasonable alternative avenues of communication since the issue was never decided by the court below?

2. Does the Washington Supreme Court's determination that certain portions of Tukwila Ordinance 1465 are non-severable rest on independent and adequate state law grounds such that this Court lacks jurisdiction to review the issue of severability?

3. Is the decision of the Washington Supreme Court rendered moot by the enactment of Tukwila Ordinance 1581 which amends portions of Ordinance 1465?

4. Does the Washington Supreme Court's determination that Tukwila Ordinance No. 1465 is not narrowly

tailored to further a significant governmental interest conflict with prior decisions of this Court?

5. Should this Court defer to the factual findings made by the lower court which were the basis of the judgment?

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I. STATEMENT OF THE CASE

The Respondent's business is located in a converted single family residence along a local thoroughfare known as Interurban Avenue. I RT 53.[1],[2] The business has both a retail component and video viewing booths. FF 2. The retail department and the booths are located in separate rooms. I RT 56. In the retail department, the business rents and sells sexually explicit video tapes and it

---

[1] Trial in this case took place on May 10, 11 and 12, 1989, and each day of trial represents a separate volume of the trial transcript. These volumes are referred to as I RT, II RT and III RT respectively.

[2] Pursuant to Supreme Court Rule 29.1, counsel represents that there are no parent or subsidiary companies of the respondent World Wide Video.

sells sexually explicit magazines and novelty items. FF 2, I RT 56. According to Tukwila Ordinance No. 1465, the business qualifies as an "adult bookstore" under subsection 1(A)(1), an "adult motion picture theater" under subsection 1(A)(5), an "adult retail store" under subsection 1(A)(6), and an "adult video store" under subsection 1(A)(8).

According to the subsections of the ordinance referred to above, businesses fall within the definition of "adult bookstore," "adult retail store," and "adult video store" if ten percent or more of their stock in trade consists of sexually explicit material. There is no percentage figure given in the definition of the phrase "adult motion picture theater" but the definition on its face would apply to a building used for the

presentation of a single sexually explicit film.

The land use studies considered by Senior Planner Jack Pace prior to recommending enactment of Ordinance No. 1465 were done in the seventies and early 1980's. I RT 80. They were done prior to the explosion of the home video market and they dealt mainly with "movie theaters," meaning businesses which show reel to reel film and have seating areas for the audience. I RT 80-82. None of the studies or court decisions relied upon by Mr. Pace in recommending enactment of Ordinance No. 1465 considered the land use effects of businesses which sell or rent video tapes exclusively for home viewing. Id. At the time of trial, testimony was presented that businesses of this nature

were operating in the City of Tukwila and in nearby communities. II RT 311-321.

None of the land use studies considered by Mr. Pace establish that businesses which have ten and a half percent sexually explicit material cause the same adverse secondary effects as those which have one hundred percent of their business devoted to such material. FF 27.

At the time that Mr. Pace undertook his land use study, the City had the opportunity to consider the actual effects of adult entertainment businesses within its boundaries and failed to do so. FF 23. No evidence was presented to the City Council or to the trial court suggesting that the respondent's business caused depreciation of property values. FF 22. Other businesses in the immediate neighborhood of the Respondent's business

included a night club, a card room and two taverns. FF 3. According to police statistics compiled between November 1987 and January 1989, other businesses in the area have generated more crime than the Respondent's business. FF 25, 26. There is no evidence that the Respondent's business has inhibited real estate development in the neighborhood in which it is located. I RT 78.

Tukwila Ordinance 1465 relegates businesses such as that belonging to the Respondent to the M-2 Heavy Industrial District. The trial court made a finding that there is no land available in the M-2 zone that would support a small retail business such as that belonging to the Respondent. FF 38.

After the Washington Supreme Court issued its written opinion, the Petitioner filed a motion for

reconsideration. See Appendix A. In the motion, the Petitioner argued that the portion of Ordinance 1465 imposing exclusionary zoning on "adult motion picture theaters" as defined in subsection 1(A)(5) should be severed from the sections which the court declared unconstitutional. Id. The motion for reconsideration was denied.

In October 1990, the Tukwila City Council enacted Ordinance No. 1581 which is set forth in its entirety in Appendix B. Ordinance 1581 deals with the same subject matter as Ordinance 1465. Id.

II. SUMMARY OF ARGUMENT

The Respondent maintains that this Court lacks jurisdiction to decide whether Tukwila Ordinance No. 1465 leaves open reasonable alternative channels of communication because that question was

never decided by the lower court. Similarly, this Court lacks jurisdiction to decide whether certain portions of Ordinance No. 1465 are severable because that issue was decided adversely to the Petitioner on independent and adequate state law grounds. There is no "case" or "controversy" within the meaning of Article III of the United States Constitution because this case is rendered moot by the enactment of a new ordinance which amends the pertinent sections of Ordinance No. 1465. The Washington Supreme Court correctly applied the principles announced by this Court in City of Renton v. Playtime Theater, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), in determining that Ordinance No. 1465 was not narrowly tailored to serve a significant governmental interest. Finally, this

Court should defer to the factual findings of the lower court which were the basis of the judgment in the Respondent's favor.

III. ARGUMENT

A. This court lacks jurisdiction to decide whether Tukwila Ordinance No. 1465 affords reasonable alternative channels of communication.

In City of Renton, supra this Court held that content neutral adult entertainment zoning ordinances are to be measured by the standards for determining the constitutionality of time, place and manner restrictions. 475 U.S. 49, 50. The Respondent assumes for the sake of this argument that Tukwila Ordinance No. 1465 is content neutral and was passed for a non-discriminatory purpose. The standard for measuring the constitutionality of content neutral time, place and manner restrictions is

whether they are narrowly tailored to serve a significant governmental interest and leave open alternative channels of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).

The Petitioner has invited this Court to decide the broad question of whether or not Tukwila Ordinance No. 1465 comports with the First Amendment and argues at pp. 22-24 of its Petition that the ordinance provides for ample alternative channels of communication. However, in making the determination that Ordinance No. 1465 violated the First Amendment, the Washington Supreme Court simply determined that the ordinance was not "narrowly tailored" and specifically declined to decide whether or not the ordinance unreasonably limited alternative channels of communication.

World Wide Video v. City of Tukwila, 117 Wn.2d 382, 389, 390, 816 P.2d 18 (1991). Under the enabling statute, Title 28, U.S.C. §1257(a), this Court lacks jurisdiction to review questions not passed upon by the court below. Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969); Michigan v. Long, 463 U.S. 1032, 1035, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). This Court should therefore decline to decide the question of whether or not Tukwila Ordinance No. 1465 leaves open reasonable alternative channels of communication.

B. There are independent and adequate state grounds for the Washington Supreme Court's determination of non-severability.

At p. 15 of the Petition, the Petitioner's counsel argues:

> At a minimum, Ordinance 1465 should be found constitutional with respect to the defined 'on premises' adult entertainment establishments.

The suggestion that the constitutional portion of the ordinance should be severed from the unconstitutional sections was rejected by the Washington Supreme Court when it denied the Petitioner's motion for reconsideration.

A state court judgment which rests on independent and adequate state law grounds is unreviewable by the United States Supreme Court pursuant to its appellate jurisdiction. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 495 U.S. ___, 110 L. Ed. 2d 17, 110 S. Ct. ____ (1990). Severability of a statute is a question of legislative intent and is resolved by reference to local law. Brockett v. Spokane Arcades,

Inc., 472 U.S. 491, 506, 86 L. Ed. 2d 394, 105 S. Ct. 1794 (1985). Erroneous construction of a state statute does not present a federal question. Neblett v. Carpenter, 305 U.S. 297, 83 L. Ed. 182, 59 S. Ct. 170 (1938); King v. West Virginia, 216 U.S. 92, 54 L. Ed. 396, 30 S. Ct. 225 (1910). This court has also held that the decision of a state court that a void provision of a state statute is severable from its valid portion does not present a federal question. King v. West Virginia, supra at p. 101.

Since the Washington Supreme Court's determination of non-severability was one of statutory construction and rested on independent and adequate state law grounds, this court lacks jurisdiction to decide the issue of severability.

C. The Petitioner is asking this Court to decide issues that are moot.

Following the decision of the trial court striking Tukwila Ordinance No. 1465, the Petitioner enacted Ordinance No. 1581 dealing with the same subject matter. See Appendix B. Section 1(A) of Ordinance 1581 makes reference to the experience of the City of Tukwila with adult entertainment establishments and establishes a new legislative record. Appendix B-4. Section 1(B) changes the definitions of "adult bookstore," "adult video store," and "adult retail store" from businesses which maintain "ten percent or more of their stock in trade" as sexually explicit material to "thirty percent or more." Appendix B-5 through B-9. Section 2 allocates a different area of the City - the CM district - to

adult entertainment establishments. Appendix B-11.

Enactment of a superseding statute which satisfies all the principles sought in an earlier attack moots the case. Kremens v. Bartley, 431 U.S. 119, 129, 130, 52 L. Ed. 2d 184, 97 S. Ct. 1709 (1977) and see also, Wright, Miller and Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters, §3533.6, pp. 342, 343. On the other hand, a judgment invalidating a state statute is not rendered moot by reason of an amendment of the statutory provision in question where the amendment contains an identical provision. Schall v. Martin, 467 U.S. 253, 256, n.6, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984) and see also Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1331, 1332 (9th Cir. 1987).

The amendments to the definitional sections of the ordinance and the provision governing where adult entertainment establishments can locate are not identical to the original provisions and are obvious efforts to address the constitutional defects which were the basis of the lower court's decision. The questions regarding the constitutionality of these portions of Ordinance No. 1465 are therefore moot.

At first blush, the two ordinances are the same in the sense that both apply to sexually oriented businesses which are predominately retail in character. However, the Washington Supreme Court did not determine that Ordinance No. 1465 was unconstitutional on its face because it applied to these businesses but rather that the legislative record did not contain the necessary evidence to support

the City's position. Ordinance No. 1581 is based upon an entirely different legislative record which makes reference to the experience of the City of Tukwila and surrounding cities with adult entertainment uses. Therefore the decision of the court below striking the ordinance on the basis of an inadequate legislative record is also rendered moot by the enactment of the new ordinance.

D. The decision of the Washington Supreme Court does not conflict with previous decisions of this Court.

According to the decision of this Court in City of Renton v. Playtime Theater, Inc., supra, content neutral adult entertainment zoning ordinances must serve a significant governmental interest and leave open reasonable alternative channels of communication. 475 U.S. 49, 50. This is an application of the standard for judging the

constitutionality of time, place and manner restrictions articulated in such cases as Clark v. Community of Creative Non-Violence, supra. See City of Renton, supra at 50 wherein the Clark decision is cited with approval. In order to be upheld, time, place and manner restrictions must also be "narrowly tailored" to achieve the articulated governmental interest. Clark, supra at 293. This same principle was recognized in the Renton decision wherein this Court stated:

> Moreover, the Renton ordinance is 'narrowly tailored' to affect only the category of theaters shown to produce the unwanted secondary effects thus avoiding the flaw that proved fatal to the regulations in Schad v. Mt. Efraim, (cite omitted), and Erznoznik v. City of Jacksonville, (cite omitted).

475 U.S. 52.

Similar analysis was employed by Justice Powell in his concurring opinion in Young v. American Mini Theaters, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). In that decision, Justice Powell analyzed the constitutionality of the Detroit ordinance under the four part test of U.S. v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Under the fourth prong of the O'Brien test, the restriction on speech must be no greater than essential to achieve the asserted governmental interest. With respect to this part of the O'Brien test, Justice Powell stated:

> The evidence presented to the common council indicated that the urban deterioration was threatened, not by the concentration of all movie theaters with other 'regulated uses,' but only by a concentration of those that elected to specialize in adult movies. The case would be a different situation had Detroit

> brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.

427 U.S. 82, (emphasis supplied).

The concept of a "narrowly tailored" ordinance received further definition in Ward v. Rock Against Racism, 491 U.S. 781, 103 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). Under this standard, the ordinance need not be the least restrictive or least intrusive means to serve the government's interest. 491 U.S. 798. The government need only show that the asserted interest would be achieved less effectively absent the regulation. This Court went on to state:

> To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial

> portion of the burden on speech does not serve to advance its goals.

491 U.S. 799.

In Board of Trustees SUNY v. Fox, 492 U.S. 469, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989), Justice Scalia described the "narrowly tailored" test as requiring a "fit" between the legislative ends and the means chosen to accomplish those ends. 492 U.S. 480.[3] He distinguished this test from the rational basis test which allows a law to be upheld if it could be thought to further a legitimate governmental interest without reference to whether it does so at inordinate cost. Id. Under the narrowly tailored test,

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[3] This opinion is significant also because it involves "commercial speech" which is recognized as being a less protected form of speech.

the governmental goal must be substantial and the cost carefully calculated. Id. The State bears the burden of justifying its restriction and it must establish "the reasonable fit." Id.

Thus, the "narrowly tailored" test is necessarily fact specific and assumes that the government will carry the burden of justification. Both Renton and Young specifically recognize that an exclusionary zoning ordinance would not be narrowly tailored if it applied to theaters which were not shown to contribute to the deterioration of surrounding areas. This is tantamount to saying that such a law burdens "substantially more speech than is necessary to further the government's legitimate interest." Ward, supra at 799.

The determination by the Washington Supreme Court that Ordinance No. 1465 is not narrowly tailored rested on the absence of a showing by the Petitioner that adult entertainment businesses with predominately take home merchandise have the same harmful secondary effects as those traditionally associated with adult movie theaters. World Wide Video v. Tukwila, supra at 389, 390. It rested also on the trial court's finding that none of the studies considered by the Petitioner establish that businesses which limit their stock in trade to "ten percent or more" sexually explicit material have adverse secondary effects. Id. Lower courts applying the substantial governmental interest prong of the Renton test have insisted that there be evidence in the record, which could consist of studies done by other

cities, which establishes that secondary effects actually exist and are the result of the businesses subject to regulation. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987). Lower courts have also found that exclusionary zoning ordinances are not narrowly tailored to the extent that they apply to a movie theater which shows a single adult film, in the absence of evidence that a single showing of an adult movie would have any harmful secondary effects on the community. Tollis, Inc. v. San Bernardino County, supra at 1332; People v. Superior Court (Lucero), 259 Cal. Rptr. 740, 746 (Cal. 1989). The Respondent submits that these lower court decisions are faithful

renditions of the Renton principle and they support the position of the Washington Supreme Court.

This Court in City of Renton said that cites could rely on the studies done by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be necessary to the problem that the city addresses." 479 U.S. 51. The Fifth Circuit in SDJ, Inc. v. City of Houston, supra stated that a legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experience of other cities. 837 F.2d 1274. The land use studies considered by the Petitioner all dealt with traditional auditorium style movie theaters with conspicuous advertising and which necessarily attract a concentration of audience members for on-premises

viewing.[4] There is nothing in these studies to support a reasonable inference that predominately retail businesses whose only similarity is the content of published materials would have the same impact on surrounding neighborhoods as auditorium style theaters. This conclusion is made even more obvious by the city's failure to make use of readily available evidence derived from the Respondent's business, or other video stores in the region, to support its position. The Petitioner's claim on page 25 of its Petition that "the city

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[4] This includes the land use study in North End Cinema, Inc. v. Seattle, 90 Wn.2d 209, 585 P.2d 1153 (1978) which provided the legislative record in the Renton decision. See City of Renton, supra at 51.

looked at all available evidence" is simply false and is contradicted by the express finding of the trial court.

E. This court should defer to the factual findings of the court below which were the basis of the judgment.

The trial court made a finding that businesses which limit their inventory to ten and a half percent sexually explicit matter do not cause adverse secondary effects. The trial court also made a finding that there was readily available evidence which would have enabled the Petitioner to determine the land use impacts of the plaintiff's business and the Petitioner failed to consider it. Finally, the Washington Supreme Court made a finding based upon the record below that the Petitioner failed to marshal sufficient evidence to establish that retail establishments which sell or

lease sexually explicit materials for perusal in the privacy of the home have adverse secondary impacts on surrounding neighborhoods. These findings were dispositive of the case and led to the conclusion by the Washington Supreme Court that Ordinance No. 1465 was not narrowly tailored.

While state court findings bearing on federal constitutional rights are not conclusive upon this Court, they are entitled to great weight. Michel v. Louisiana, 350 U.S. 91, 96, 100 L. Ed. 83, 76 S. Ct. 158 (1955). This Court will customarily accept the factual findings of state courts in the absence of exceptional circumstances. Liquor Corp. v. Duffy, 479 U.S. 335, 351, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987). While this Court might draw different conclusions from the evidence in this

record if it were reviewing the case de novo, or if it were considering the judgment of a lower federal court, there are no "exceptional circumstances" present to enable this Court to make findings different than those relied on by the Washington Supreme Court and which were the basis of the judgment.

IV. CONCLUSION

The decision of the Washington Supreme Court in this case doesn't stand for a broad ranging principle which will significantly affect the future of land use regulation. The decision of the lower court was essentially based on resolution of disputed facts. The Washington Supreme Court simply found that under the unique facts of this case, the Petitioner failed to sustain its burden of proof. There is no res judicata bar of any significance. There

is nothing to prevent the Petitioner from taking advantage of readily available evidence and reenacting similar legislation, which conceivably it has already done with the passage of Ordinance No. 1581. The Petition for a Writ of Certiorari should therefore be denied.

RESPECTFULLY SUBMITTED this 23rd day of March, 1992.

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No. 56619-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

WORLD WIDE VIDEO OF WASHINGTON,
Appellant and Cross-Respondent

v.

CITY OF TUKWILA, a Washington
municipal corporation,
Respondent and Cross Appellant

CITY OF TUKWILA'S MOTION FOR RECONSIDERATION

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Rules

RAP 12.4..... 1, 2

The City of Tukwila submits this motion for reconsideration pursuant to Rules of Appellate Procedure 12.4:

I. IDENTITY OF MOVING PARTY.

Respondent and Cross-Appellant the City of Tukwila requests the relief designated in paragraph 2 below.

II. STATEMENT OF RELIEF SOUGHT.

The City of Tukwila requests that this Court reconsider that portion of its September 19, 1991 decision in this matter, described more fully below, which ascribes the same federal constitutional analysis to both the peep show [motion picture] portion and the "take-home merchandise" portion of World Wide Video's business.

III. FACTS RELEVANT TO MOTION

This Court recognized that World Wide Video, in one location, sells and rents sexually explicit magazines and

video tapes, and it also operates eight peep show booths on the premises. Exhibit A, Slip Opinion, at 2, Finding of Fact No. 2. The peep show booths were the focus of much trial testimony, generally centered around illegal activity occurring in and around those booths. Finding of Fact Nos. 5 and 39-47, and City's Opening Brief at pp. 13-16. Under Ordinance No. 1465 (attached as Exhibit B), the zoning ordinance at issue in this case, the peep show booths fall within the definition of "adult motion picture theater". Exhibit B, Section 1 at TMC 18.05.825(A)(5).

IV. GROUNDS FOR RELIEF AND ARGUMENT.

Rule of Appellate Procedure 12.4 authorizes a party to file a motion for reconsideration of a decision terminating review.

The Court recognized that:

> "In addition to selling and renting sexually explicit magazines, novelties, and video tapes, WWV has eight panoram, or peep show, booths on the premises....
>
> Ordinance 1465 regulates adult motion picture theaters, adult bookstores, adult video stores, adult retail stores, and other adult uses." [Emphasis added.]

Slip Opinion at 2.

The Court also recognized that the "written or filmed materials distributed by WWV are 'pure' speech for the purposes of the First Amendment." Slip Opinion at 6. In two passages critical to this motion, however, the Court goes on to say that:

> "Tukwila has not shown that adult businesses with predominantly 'take home' merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the 'substantial governmental interest' portion of the test has not been met."

Slip Opinion at 7.

And further:

> "The Tukwila ordinance does not pass this test; it strives to regulate forms of expressive activity different from those studied in the materials upon which it relies."

Slip Opinion at 8-9.

The City considered a wide range of materials from a wide variety of sources in enacting Ordinance No. 1465. See, e.g., Trial Exhibits 2-6, Finding of Fact Nos. 9-11. Those materials make clear, especially when coupled with Senior Planner Jack Pace's testimony, that the City was well aware of the undesirable secondary effects associated with adult motion picture theaters and live nude entertainment. Mr. Pace specifically identified three adverse land use impacts associated with the adult entertainment: increase in crime, decrease in property

value, and incompatibility with other uses. Trial Exhibit 3, pp. 3-5; III RP 390: 6-392:1.

This was not a case of Mr. Pace ignoring relevant studies or other literature regarding the impacts of adult video stores -- there simply were none to be found. Mr. Pace was looking for "all studies that were available that were relevant to what we were looking at." See I RP 117:11-123:2.

The undesirable effects associated with adult motion picture theaters and live adult entertainment (as opposed to effects with "take-home" merchandise), however, are well known and were included in the trial record. Ordinance No. 1465 includes a severability clause. Exhibit B, at Section 5. Applying the studies and trial testimony in conjunction with the severability clause, together with

this Court's reasoning, only the definitions of "adult bookstore", "adult retail store", and "adult video store" should be found unconstitutional. Exhibit B at Section 1, TMC 18.06.825(A)(2), (6), and (8). The remaining definitions involve adult entertainment establishments different than those which deal in "take-home" pornographic merchandise. The undesirable effects associated with these "on-site" adult entertainment establishments are well documented and are part of the trial record. The City is entitled to rely on those reports under Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

By severing the ordinance's application to "take-home" establishments, the Court is able to

uphold the constitutionality of the remainder of the ordinance. "Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." Slip Opinion at 11.

V. CONCLUSION

The City requests that this Court reconsider its decision and strike only the application of Ordinance No. 1465 to the defined "take-home" establishments of adult bookstores, retail stores, and video stores.

DATED this 8th day of October, 1991.

Respectfully submitted,

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CITY OF TUKWILA

Ordinance No. 1581

AN ORDINANCE OF THE CITY OF TUKWILA, WASHINGTON, REENACTING AND AMENDING SECTION 18.06.825 OF THE TUKWILA MUNICIPAL CODE TO DEFINE "ADULT ENTERTAINMENT ESTABLISHMENTS", ADDING A NEW SUBSECTION 18.38.020(16) TO THE TUKWILA MUNICIPAL CODE TO ALLOW ADULT ENTERTAINMENT FACILITIES TO LOCATE IN THE C-M (INDUSTRIAL PART) DISTRICT, AMENDING SECTION 18.30.020(33) RELATING TO THEATERS IN C-2 ZONING DISTRICTS, AND ADDING A NEW SECTION 18.70.110 TO THE TUKWILA MUNICIPAL CODE REGARDING NONCONFORMING ADULT ENTERTAINMENT ESTABLISHMENTS.

WHEREAS, the City of Tukwila Planning Commission conducted a public hearing at which it heard testimony, reviewed exhibits, and deliberated on the issue of appropriate land use regulations governing adult entertainment establishments in the City of Tukwila, and

WHEREAS, as a result of said deliberation, the Planning Commission adopted findings and conclusions and formulated a recommendation to the City Council, and

WHEREAS, having held further public hearings on the matter and having considered the record before the Planning Commission and the recommendations of that body, the City Council concurred in part with those recommendations and adopted findings and conclusions, now, therefore,

THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Adult Entertainment Establishments Defined. Section 18.06.825 of the Tukwila Municipal Code is hereby amended to read as follows:

18.06.825 Adult Entertainment Establishments.

A. Legislative Findings. The City Council of the City of Tukwila, Washington, declares that adult entertainment establishments as defined in this chapter are permitted uses in the City of Tukwila. In order to preserve and protect Tukwila's unique quality of life, however, the City Council finds that adult entertainment establishments must be situated so as to minimize contact with the City's children, churches, parks,

schools, libraries, and other places where children and families gather.

The City Council finds further that Tukwila's experience, and the experiences of other cities in and around Tukwila and in other areas of the country, confirm that adult entertainment establishments can lead to an increase in crime and unreported criminal activity, a decrease in property values and the use and enjoyment of such property by its owners, and to undesirable blighting of the city and its neighborhoods. Accordingly, the City Council declares the provisions of this ordinance as they relate to adult entertainment establishments to be in the best interests of the citizens of the City of Tukwila,

simultaneously ensuring the protection of the health, safety and welfare of Tukwila residents, while also permitting adult entertainment establishments to locate in areas comprising approximately twenty-five percent of the City of Tukwila.

B. "Adult entertainment establishments" means adult motion picture theaters, adult drive-in theaters, adult bookstores, adult cabarets, adult video stores, adult retail stores, adult massage parlors, adult sauna parlors or adult bathhouses, which are defined as follows:

1. "Adult bathhouse" is a commercial bathhouse which excludes any person by virtue of age from all or any portion of the premises.

2. "Adult bookstore" is a retail

establishment in which thirty percent or more of the "stock in trade" consists of books, magazines, posters, pictures, periodicals or other printed materials distinguished or characterized by an emphasis on matter depicting, deriving or relating to "specified sexual activities" or "specified anatomical areas".

3. "Adult cabaret" is a commercial establishment which presents go-go dancers, strippers, male or female impersonators, or similar types of entertainment and which excludes any person by virtue of age from all or any portion of the premises.

4. "Adult massage parlor" is a commercial establishment in

which massage or other touching of the human body is provided for a fee and which excludes any person by virtue of age from all or any portion of the premises in which such service is provided.

5. "Adult motion picture theater" is a building, enclosure, or portion thereof, used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" for observation by patrons therein and which exclude any person by virtue of age from all or any portion of the premises.

6. "Adult retail store" is a retail establishment in which thirty percent or more of the "stock in trade" consists of items, products or equipment distinguished or characterized by an emphasis on or simulation of "specified sexual activities" or "specified anatomical areas".

7. "Adult sauna parlor" is a commercial sauna establishment which excludes any person by virtue of age from all or any portion of the premises.

8. "Adult video store" is a retail establishment in which thirty percent or more of the "stock in trade" consists of prerecorded video tapes, disks, or similar material

distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas".

C. "Specified anatomical areas" means:

1. Less than completely and/or opaquely covered human genitals, pubic region, buttock, or female breast below a point immediately above the top of the areola.

2. Human male genitals in a discernibly turgid state even if completely or opaquely covered.

D. "Specified sexual activities" means:

1. Acts of human masturbation, sexual intercourse or sodomy; or

2. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast; or

3. Human genitals in a state or sexual stimulation or arousal.

E. "Stock in trade" means:

1. The dollar value of all products, equipment, books, magazines, posters, pictures, periodicals, prerecorded video tapes, discs, or similar material regularly available in the normal course of the business of that establishment and readily available for purchase, rental, viewing or use by patrols of the establishment, excluding material located in any store room or other portion of the

premises not regularly open to patrons; or

2. The number of titles of all products, equipment, books, magazines, posters, pictures, periodicals, other printed materials, prerecorded video tapes, discs, or similar material regularly available in the normal course of the business of that establishment and readily available for purchase, rental, viewing or use by patrons of the establishment, excluding material located in any store room or other portion of the premises not regularly open to patrons.

Section 2. Adult Entertainment Establishments allowed in C-M District.

A new subsection 18.38.020(16) is hereby added to the Tukwila Municipal Code to read as follows:

(16) Adult entertainment establishments, subject to the following location restrictions.

A. No adult entertainment shall be allowed within the following distances from the following specified uses, areas or zones, whether such uses, areas or zones are located within or outside the City limits;

1. In or within 1,000 feet of any R-1, R-2, R-3, R-4, or RMH zone district or any other residentially zoned property;

2. In or within 1,000 feet of:

a. public or private school with curricula equivalent to elementary, junior or

senior high schools, or any facility owned or operated by such schools, which has twenty-five percent or more of its students under the age of eighteen; and

b. care centers, preschools, nursery schools or other child care facilities.

3. In or within 1,000 feet of:

a. public park, trail, or public recreational facility; or

b. church, temple, synagogue or chapel; or

c. public library.

B. The distances specified in subsection A shall be measured by following a straight line from the nearest point of the property parcel

upon which the proposed use is to be located, to the nearest point of the parcel of property or land use district boundary line from which the proposed land use is to be separated.

C. No adult entertainment establishment shall be allowed to locate within 1,000 feet of an existing adult entertainment establishment. The distance specified in this section shall be measured by following a straight line between the nearest points of public entry into each establishment.

Section 3. Theaters in C-2 Districts. Section 18.30.020(33) of the Tukwila Municipal Code is hereby amended to read as follows:

(33) Theaters, except those theaters which constitute "adult

entertainment establishments" as defined by this Code.

Section 4. Nonconforming Uses. A new section 18.70.110 is hereby added to the Tukwila Municipal Code to read as follows:

18.70.110 Nonconforming Adult Entertainment Establishments; Extensions of Time. Notwithstanding any other provisions of Ordinance _____ of the City shall be terminated or discontinued within 90 days from the effective date of that ordinance.

A. The owner or operator of any adult entertainment use or establishment which is rendered nonconforming by the provisions of Ordinance ____ of the City may appeal the 90-day termination provision of this section by filing a notice of appeal

with the City Clerk within 60 days of the effective date of this section.

B. Within 10 days of receipt of a notice of appeal, the City Clerk shall schedule a hearing on the appeal before a hearing examiner. The hearing shall be no later than 20 days from the date of receipt by the City of the notice of appeal, unless extended by mutual agreement of the parties. The hearing examiner shall be the City Clerk of his/her designee.

C. Within 3 days, excluding weekends and holidays recognized by the City, from the date of the hearing on an appeal under this section, the hearing examiner shall issue a written decision, which shall set forth the hearing examiner's

findings of fact and conclusions of law. The hearing examiner shall consider the following factors and any other facts that he/she determines to be relevant or helpful in reaching a decision:

1. The harm or hardship to the appellant caused by the 90-day termination provision of this section.
2. The benefit to the public to be gained from termination of the use;
3. The nature of the leasehold or other ownership interest that an appellant may have in premises occupied by the adult entertainment use;
4. Restrictions or lack of same imposed on an appellant's use of such premises by a lease or

other binding agreement;

5. Amounts expended by an appellant for improvements to such premises or for necessary equipment and the extent to which those amounts have been recovered through depreciation, tax savings, or whether such improvements are contemplated to be left as property of the lessor; and

6. Any clear evidence of substantial economic harm caused by enforcement of the 90-day termination provision of this section.

D. Appeal and hearing:

1. Any person aggrieved by the action of the hearing examiner in refusing to extend beyond 90 days the period in which a

nonconforming use must terminate operations shall have the right to appeal such action to the City Council, by filing a notice of appeal with the Clerk within 10 calendar days of receiving notice of the decision of the hearing examiner.

2. The City Council, upon receipt of a timely notice of appeal, shall set a date for a hearing of such appeal within 20 days from the date of such receipt. The City Council shall hear testimony, take evidence and may hear oral argument and receive written briefs. The filing of such appeal shall stay further action of the City, pending the decision of

the City Council.

3. The decision of the City Council on an appeal from a decision of the hearing examiner shall be based upon a preponderance of the evidence.

4. The decision of the City Council shall be final unless appealed to the superior court within 20 days of the date the decision is entered.

Section 5. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality or any other section, sentence, clause or phrase of this ordinance.

Section 6. Effective Date. This

ordinance shall take effect and be in full force five (5) days after publication of the attached summary which is hereby approved.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a regular meeting thereof this 1st day of October, 1990.

APPROVED:

_____
MAYOR, GARY L. VAN DUSEN

ATTEST/AUTHENTICATED:

_____
CITY CLERK, JANE CANTU

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

By_____
MICHAEL KENYON

FILED WITH THE CITY CLERK: 9-27-90
PASSED BY THE CITY COUNCIL: 10-1-90
PUBLISHED: 10-7-90
EFFECTIVE DATE: 10-12-90
ORDINANCE NO. 1581